86-270

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1986

SAN FRANCISCO ARTS & ATHLETICS, INC.
and DR. THOMAS F. WADDELL,

Petitioners,

v.

UNITED STATES OLYMPIC COMMITTEE and
INTERNATIONAL OLYMPIC COMMITTEE,

Respondents.

On Petition For Writ Of Certiorari To
The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. IN ENACTING THE AMATEUR SPORTS ACT OF 1978, 36 U.S.C. SECS. 371 ET SEQ., DID CONGRESS INTEND TO BESTOW UPON THE UNITED STATES OLYMPIC COMMITTEE AN EXCLUSIVE AUTHORITY TO PROHIBIT AND ENJOIN VIRTUALLY ANY AND EVERY USE OF THE WORD "OLYMPIC"?

2. ARE THE WELL-ESTABLISHED TENETS OF TRADEMARK LAW THAT GENERIC TERMS CANNOT BE TRADEMARKS AND THAT A PARTY MAY USE AN OTHERWISE INCONTESTABLE TRADEMARK FAIRLY TO DESCRIBE ITS GOODS OR SERVICES ROOTED IN FIRST AMENDMENT CONSIDERATIONS OF PRESERVING FREEDOM OF SPEECH AND PROTECTING THE RICHNESS OF THE HUMAN VOCABULARY AGAINST CLAIMS OF PRIVATE OWNERSHIP?

3. GIVEN THAT USOC WAS CREATED AND CHARTERED BY CONGRESS TO PERFORM A PUBLIC FUNCTION, AND GIVEN THAT USOC RECEIVES AND USES SUBSTANTIAL PUBLIC RESOURCES TO THAT END, IS USOC ENGAGED IN "STATE ACTION" SUCH THAT IT MAY NOT VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS BY SELECTING AMONG DIVERSE POTENTIAL USERS OF THE WORD "OLYMPIC", BASED UPON SPEECH-SUPPRESSING AND INVIDIOUSLY DISCRIMINATORY MOTIVES?

4. CAN AN INJUNCTION PROHIBITING USE OF "OLYMPIC" BY A NONPROFIT CORPORATION THAT IS TANGENTIALLY ENGAGED IN RAISING MONEY FOR ITS CAUSE BE RECONCILED WITH TRADEMARK INFRINGEMENT AND COMMERCIAL SPEECH PRECEDENTS THAT REQUIRE BALANCING OF THE GOVERNMENTAL INTERESTS IN REGULATING FRAUDULENT COMMERCIAL SPEECH AGAINST FREE SPEECH INTERESTS?

5. IF THE AMATEUR SPORTS ACT OF 1978 SETTLED NOTHING MORE OR LESS THAN AN INCONTESTABLE TRADEMARK UPON USOC AS TO THE WORD "OLYMPIC", SHOULD THAT TRADEMARK BE ENFORCED ACCORDING TO THE STANDARD OF PROOF AND DEFENSES TO TRADEMARK INFRINGEMENT, AS WELL AS THE STANDARD FOR AWARDING ATTORNEYS' FEES, DEVELOPED OVER FORTY YEARS OF LITIGATION UNDER THE TRADEMARK ACT OF 1946?

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Ninth Circuit on the merits of this case is reported at 781 F.2d 733 (9th Cir. 1986) and is set out in the Appendix (App.) at part 1. The order denying en banc review and amending that opinion is set out at App. part 2. The opinion of the judges dissenting from the denial of rehearing and rejection of

en banc review is set out at App. part 3. The oral opinion of the U.S. District Court for the Northern District of California granting summary judgment and its written opinion awarding attorneys' fees are unreported, and are set out at App. parts 4 and 5. The judgment and permanent injunction are set out at App. part 6. The opinion of the U.S. District Court granting a preliminary injunction against petitioners is reported at 219 U.S.P.Q. 983 (N.D.Cal. 1982) and is set out at App. part 7. The preliminary injunction was affirmed by the Court of Appeals, 707 F.2d 517 (9th Cir. 1983); the Court of Appeals issued a written unpublished opinion that is set out at App. part 7. The District Court's order granting preliminary injunction is reported at 219 U.S.P.Q. 983 (N.D.Cal. 1982) and is set out at App. part 8.

JURISDICTION

The decision of the Court of Appeals of which review is sought was issued on January 27, 1986. A timely petition for rehearing and suggestion for rehearing en banc was filed on February 10, 1986; it was denied on May 22, 1986. No application for an extension of time to file this petition for certiorari has been made. This Court's jurisdiction is invoked under 28 U.S.C.sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Amateur Sports Act of 1978, 36 U.S. Code section 371 et seq., provides in pertinent part as follows:

> "(a) Without the consent of [USOC], any person who uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition---
> (4) the words "Olympic", "olympiad", "Citius Altius Fortius,", or any combination thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with [USOC] or any Olympic activity; . . .
> shall be subject to suit in a civil action by the [USOC] for the remedies provided in the Act of July 5, 1946 (60 Stat. 427; popularly known as the Trademark Act of 1946) . .".
>
> (c) [USOC] shall have exclusive right to use . . . the words 'Olympic', 'Olympiad', 'Citius Altius Fortius' or any combination thereof subject to the preexisting rights described in subsection (a)."
> 36 U.S.Code section 380(a)(4)& (c)(1982).

The constitutional guarantees that are involved in this petition for certiorari include:

> "Congress shall make no law...abridging the freedom of speech...",
> Amend. I (1791),
>
> and,
>
> "No State shall ...deny to any person within its jurisdiction the equal protection of the laws."
> Amend. XIV (1868).

STATEMENT OF THE CASE

Statement of Facts

Petitioner San Francisco Arts & Athletics Inc. (SFA&A) is a California non-profit corporation in good standing that is chartered to conduct public cultural events, including athletic competitions and arts activities, "...to educate the general public on the vitality, variety and versatility of the gay movement." (Dkt.17 at Ex.DD)[1] In August 1982, what was supposed to be called "Gay Olympic Games I" was staged by SFA&A in San Francisco, California.

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[1] Those parts of the record that are not published in the Excerpts of Record on appeal in the U.S. Court of Appeals for the Ninth Circuit are cited by Docket number ("Dkt.). Those parts of the record that are published in the Excerpts of Record on appeal in the U.S. Court of Appeals for the Ninth Circuit are cited as Excerpts ("E.") and by page number(s).

This was an international athletic competition welcoming athletes of every sexual orientation to compete in a variety of athletic contests, including numerous traditional Greek Olympic events, in order to "help balance the onslaught of the Moral Majority's perspective" (Dkt.17 at Ex.H) as to homosexuals and to "demonstrate [the gay2 community's] non-commercial involvement in a healthy endeavor" (Dkt.17 at Ex.J). The competition did not proceed as "Gay Olympic Games I" because the United States Olympic Committee (USOC) and International

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2 The terms "gay" and "lesbian" are used in this petition to connote persons of homosexual orientation having the common cause of overcoming homophobia and discrimination. Cf. Cyr v. Walls, 439 F.Supp. 697 (N.D.Tex. 1977).

Olympic Committee (IOC) secured a preliminary injunction preventing petitioners SFA&A and Waddell and their agents from any use of "olympic" in conjunction with their planned event. Petitioners strictly obeyed that injunction by excising the word from t-shirts, posters, literature including media articles, and from their vocabularies relative to Gay Games I.(Dkt.15-28; E.167).

While carefully conforming their speech and conduct to the terms of all court orders in this case, defendants SFA&A and Waddell claim a right to use the term "olympic" as a political and symbolic word which they selected for its generic power to identify and describe their proposed "Gay Olympic Games" in 1982, in 1986, and quadrennially thereafter into the indefinite future.

(Dkt.17,20,25,26) SFA&A used "olympic", until enjoined, only in the context of the word "gay" as related to the upcoming "Gay Olympic Games I". At no time have SFA&A and Dr. Waddell used or sought to use any other statutorily protected symbol, emblem or insignia of USOC or the Olympics, other than the word "olympic". (Dkt.17 at Ex.'s H-Y; 18). No evidence of any intent by SFA&A or its participants to confuse, mislead or deceive the public as to any association with USOC or official Olympic activities, nor of any result of confusion or deception, was adduced below. SFA&A has sought no association or relation with USOC or the Olympics, and openly criticized "the traditional Olympics" in its literature. (Dkt.17 at Ex.I) Indeed, in an effort to resolve this dispute before suit was filed in 1982, SFA&A and Waddell by their attorney offered to place the words "not

associated with the U.S. Olympic Committee or any Olympic activity" upon all of their goods, literature and properties.(Dkt.5).

SFA&A has established beyond dispute that there are numerous public uses of the word "olympics" by a vast array of organizations and interest groups, to promote athletic and other competitions. For example, there is an "International Police Olympics" whose promoters use the word "Olympics" and a five-ring symbol, and stage a series of traditional Olympic athletic events, which since at least 1980 has been staged annually with the knowledge of USOC. To date the organizers and promoters of the "International Police Olympics" have not been sued by USOC. (E. 167; Dkt.17 at Ex.'s F and Z). There are competitions throughout the United States called "Olympics" for firefighters, drinkers of

alcohol, senior citizens, crab-cookers, chili-makers, baby-diaperers and Armenians, to name a few. (Dkt.17 at Ex.'s BB,EE and App.1). While openly endorsing use of "olympic" in the Special Olympics, Junior Olympics and Explorer Olympics, and tacitly approving it in cases such as the Police Olympics, USOC has sued at least two politically controversial users of the term, SFA&A in conjunction with the "Gay Olympics" in the instant litigation, and a nonprofit organization that sought to protest USOC's involvement in construction of a prison at Lake Placid, New York. Stop The Olympic Prison v. USOC, 489 F.Supp. 1112 (S.D.N.Y. 1980).

In sum, this case comes to this Court as a dispute about the use of an historic, popular and common English word by a non-profit corporation and its associates in essentially non-commercial

circumstances, where an uncertain and undefined power to control use of that word has been bestowed upon an entity created and chartered by Congress to perform certain public functions.

Procedural History Of Case

This case began by the filing of a civil action by USOC and IOC against SFA&A and Waddell, its then-President, in the U.S. District Court for the Northern District of California on August 9, 1982. (E.1) The gist of that complaint was that SFA&A was using "olympic" without USOC's consent to promote the "Gay Olympic Games" of 1982, set to commence in San Francisco on August 25, 1982. (E.1-13,153) SFA&A and Waddell answered that complaint, and counterclaimed for violations of their rights to free speech and association and equal protection of the laws. (E.14-27) USOC secured a

preliminary injunction against virtually every use of the word "olympic" by SFA&A and its associates, and that preliminary injunction was upheld on appeal by the U.S. Court of Appeals for the Ninth Circuit. (App.7&8; Dkt.33-35).

After discovery, USOC moved for summary judgment and a permanent injunction against petitioners SFA&A and Waddell: USOC never pressed nor proved any claim for damages. (E.76-121) Asserting that the matters of state action, likelihood of confusion, fair use in description and the intent of SFA&A in using "olympic", and the discriminatory and speech-suppressing behavior of USOC raised triable disputes of material fact as to the claim of trademark infringement under the Amateur Sports Act of 1978 and the counterclaims, SFA&A opposed that motion. (E.122-169) Summary judgment and

a permanent injunction against use of "olympic" by SFA&A were granted (App.4&6; E. 28-30), and an appeal of that judgment and injunction followed. (E.91)

The trial court then granted ninety-six thousand six hundred dollars ($96,600.) as attorneys fees' against the non-profit corporation and its chief volunteer in favor of USOC and IOC, determining inter alia that petitioners' use of "olympic" constituted a wilful, deliberate, malicious and/or fraudulent trademark infringement and that "[a]n award of attorney's fees in this case also promotes the goals of the Amateur Sports Act...[b]ecause the USOC is the only National Olympic Committee that does not receive formal financial assistance from its host government". (App.5; E.31-35).

The U.S Court of Appeals for the

Ninth Circuit affirmed the grant of summary judgment and of a permanent injunction against SFA&A and Waddell, and reversed and remanded the attorneys' fees award. (App.1) On May 22, 1986, the Court of Appeals denied the petition for rehearing and rejected the suggestion for en banc reconsideration. (App.2) Three judges of the Court of Appeals dissented from that order, in a written opinion by Judge Alex Kozinski. (App.3) This petition for certiorari timely follows within ninety (90) days from the order denying rehearing and refusing en banc review, as required by Supreme Court rule 20.2.

REASONS FOR GRANTING THE WRIT

I. IN HOLDING THAT CONGRESS HAD THE INTENT TO BESTOW A "TRADEMARK-PLUS" UPON USOC, AND THAT USOC NEED NOT PROVE ANY TENDENCY OF AN UNCONSENTED-TO USE OF "OLYMPIC" TO CAUSE CONFUSION NOR EVEN A TRADEMARK USE, IN ORDER TO ENJOIN THE USE OF "OLYMPIC", THE COURT OF APPEALS IGNORED THE PLAIN LANGUAGE AND HISTORY OF THE STATUTE AND RENDERED A DECISION THAT UNNECESSARILY IMPLICATES THE CONSTITUTIONALITY OF A FEDERAL STATUTE.

In enacting section 380 of the Amateur Sports Act, Congress plainly used language creating a trademark in USOC, inter alia, as to the word "Olympic". 36 U.S.Code section 380 is couched entirely in trademark law formulae. The language bestowing an "exclusive right to use...'Olympic'" upon USOC, 36 U.S.C.sec.380(c), closely parallels the "exclusive right to use" language as to registered trademarks in the Lanham Act, 15 U.S.C.sec. 1115(b). The clause prohibiting unconsented-to use of

"Olympic" is framed in terms of the declared intent of Congress to enable USOC to prohibit use of this term where "tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with [USOC] or any Olympic activity". 36 U.S.C.sec. 380(a)(4).

In commenting on the relevant sections of the bill that became the Amateur Sports Act of 1978, the Commissioner of Patents & Trademarks stated in pertinent part:

> "The present bill does not make the use of the various designations...unlawful. It merely subjects the user of such designation to a civil suit when the designation is used in connection with the sale of any goods or services, or for promotional activities."
>
> 1978 U.S.Cong.& Admin.News 7496.

By section 380, "[w]ithout the consent of [USOC], any person who uses [Olypmic] for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition...shall be subject to suit ...by [USOC] for the remedies provided in the ...Trademark Act of 1946." The prior legal provision of a criminal penalty for any unauthorized use of "Olympic" and other words and symbols protected by the Act had proved unenforceable because of the requirement of proving criminal intent. 1978 U.S.Cong. & Admin. News 7488. Accordingly, in response to the letter quoted above, Congress enacted a law enabling USOC to "protect...the word...'Olympic'...by civil action pursuant to the Trademark Act of 1946." 1978 U.S.Cong.& Admin. News 7488.

The first federal court to interpret this statutory language and history concluded that section 380 was intended to bestow a trademark upon USOC as to "Olympic", that this trademark and the exclusive right of use were no more extensive than those bestowed upon registered trademarks under the Lanham Act, and that the purpose of the enactment was "to prevent all persons other than USOC from registering the Olympic words and symbols as trademarks...rather than as a blanket prohibition of all uses whether commercial or not." Stop The Olympic Prison v. USOC, 489 F.Supp. 1112, 1118-1121 (S.D.N.Y. 1980).

In ignoring the history and language of section 380(a)(4) and its interpretation in the STOP opinion, and in holding that Congress' grant of

authority to USOC as to uses of "olympic" exceeds trademark boundaries, the Court of Appeals in this case violated the basic rule that "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language expresses the legislative purpose." (citation omitted) Park 'N Fly v. Dollar Park 'N Fly, _U.S._, 105 S.Ct. 658, 662 (1985). The language employed by Congress in section 380, and its ordinary meaning as developed under the Lanham Act, dictates the simple conclusion that Congress bestowed a trademark upon USOC as to "Olympic", enforceable under the terms of pre-existing trademark law.

In holding to the contrary, that section 380 gave USOC the power to prohibit all uses of "Olympic" by any person, whether or not for commercial and

trademark purposes and whether or not the uses tended to cause confusion, the Court of Appeals in the instant case seriously misinterpreted the Act. In its declared foundation upon the Lanham Act, in its explicit use of trademark law terms of art, and in its legislative history establishing the purpose of according trademark protection to USOC as to "Olympic", Congress plainly bestowed a trademark upon USOC. The Court of Appeals' interpretation defies all of those unmistakable indicators of the meaning of the statute.

In holding that Congress intended to enable USOC to prohibit non-profit corporations and public interest groups, incidentally engaged in "trade" to the extent of selling items and promoting contests to raise money for their non-profit causes, from using the term

"Olympic", regardless of whether such uses have any "tend[ency] to cause confusion...[as to] a connection with [USOC] or any Olympic activity", 36 U.S.C.sec.380(a)(4), the Court of Appeals in the instant case rendered a decision that excises controlling language and lucid history from interpretation of the statute. These excisions do not serve Congress' intent to bestow a lawful trademark upon USOC. To the contrary, they aggrandize that intent, beyond recognition in the terms of the statute, in a fashion that creates great and unnecessary constitutional trouble.

A best-selling book containing the term "Olympic", particularly in its title or on its cover, whose author fails to secure USOC's consent to use the word, violates section 380 under the Court of Appeals' interpretation in this case,

unless the author gives the book away free of charge. A newspaper or magazine containing the term "Olympic" in a headline (which may be argued to have "induce[d] the sale" of the publication) violates section 380 and its publication may be enjoined, according to the Court of Appeals' decision. A play, contest or performance whose creators use "olympic" to promote it, or use the word in any items for sale may be enjoined by USOC, and the profits (if any) seized. By the Court of Appeals' reading of section 380, any group, whether it is composed of gay persons demonstrating concern for health and nondiscrimination or the NAACP sponsoring an "academic olympics" to show black schoolchildren's intellectual achievement, may be barred by court order from calling its contest an "olympics", regardless of the group's intent, the

lack of confusion with USOC or the Olympics, and the subsidiary nature of any commercial transaction using "olympic" in which the group engages.

The Court of Appeals had no basis or need to create these severe potentials for infringement upon First and Fourteenth Amendment rights, in its interpretation of section 380. Indeed, it had a duty to avoid an interpretation of the statute yielding these unconstitutional results. That the Court of Appeals should have adopted a narrowing construction of section 380 if necessary in order to support and protect its constitutionality is a mandate of federal statutory interpretation often reiterated by this Court, as pointed out by Judge Kozinski in behalf of the dissenters in favor of en banc review below. Regional Rail Reorganization Act

Cases, 419 U.S. 102, 134-136 (1974); United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 571 (1973) (App.3) In holding that Congress meant to give USOC more than a trademark on "olympic", the Court of Appeals gave an interpretation of section 380 that was unnecessary to serve Congress' actual purpose of giving USOC a trademark. The interpretation instead gives USOC the power to control the nation's political vocabulary as to amateur athletics and as to "olympics", in blatant contradiction of the values of free speech and equal protection.

All of the statutory safeguards erected against USOC's (and ultimately against judicial) suppression of protected speech, in the guise of trademark enforcement, are knocked down by the Court of Appeals' interpretation

of section 380. A compelling reason to grant the writ in this case is to serve Congress' intent by respecting the terms of the statute it wrote, and to prevent the constitutional havoc that is wrought by the Court of Appeals' radical departure from that plain Congressional intent to bestow a trademark upon USOC.

II. TO HOLD AS THE COURT OF APPEALS DID THAT CONGRESS HAS THE POWER TO BESTOW CONTROL OF AN IMPORTANT PART OF LANGUAGE UPON AN ENTITY OF ITS CHOOSING CUTS A MENACING IF SMALL-SEEMING HOLE IN THE HEART OF THE CONSTITUTION.

In regulating trademarks by means of the Trademark Act of 1946 and other federal laws, Congress can be said to be regulating a form of speech. It is permitted to do so, relative to the First Amendment's guarantee of freedom of speech, by the principle that Congress may make laws that prohibit false

advertising, misleading commercial representations and other speech that endangers the consuming public. Friedman v. Rodgers, 440 U.S. 1, 9 (1979)(state may prohibit use of trade names by optometrists where a history exists of public deception and abuse by that means, in that "restrictions on false, deceptive, and misleading commercial speech" are permissible). Infringement of another's trademark, which consists in essence of using a word or symbol that has come to be identified with the owner in a context that is likely to confuse the public as to the origin of goods or services, constitutes a form of misleading commercial speech, which petitioners do not question the power of Congress to prohibit.

However, if the Court of Appeals were correct that Congress did intend to

bestow a "trademark-plus" upon USOC, entitling it to prohibit non-infringing uses that are at the edge of the stream of interstate commerce (if in it at all), that intent cannot be reconciled with First Amendment decisions of this Court as to free speech. There is a degree of protection to be afforded, even to unambiguously commercial speech. Virginia State Board of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976).

Petitioners propose that the trademark law doctrines that generic terms cannot be trademarked and that a party may use an incontestable trademark fairly to describe its goods or services have roots in the fundamental principle of freedom of speech that government does not own the language, and may not command persons to speak it in particular ways or

to convey certain meanings by it. [3]

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[3]The cases that establish that generic terms cannot be trademarked ring with awareness that to permit otherwise would diminish the value of human language and communication in favor of commercial exploitation. See, e.g., MBH Enterprises Inc. v. WOKY Inc., 633 F.2d 50, 53-55 (7th Cir. 1980)(where registered service mark on "I love you" was asserted, court refused to enforce it, stating, "[w]ords are not interchangeable; they are each unique. There is a limit to the ability to appropriate the language for exclusive commercial use"); Abercrombie & Fitch v. Hunting World Inc., 537 F.2d 4, 7 (2d.Cir. 1976)("safari" held to be generic and descriptive, and not subject to trademark protection); B&L Sales v. H. Daroff, 298 F.Supp. 908, 911 (S.D.N.Y. 1969), aff'd., 421 F.2d 352, 354 (2d Cir. 1969), cert. den., 398 U.S. 952 (1970)("[t]he owner of a registered mark 'may not appropriate to itself common English slang terms and thus prevent others from using such phrases in their descriptive sense"); Delaware & Hudson Canal Co. v. Clark, 80 U.S.(13 Wall., 311, 323 ("Nor can a generic name...be employed as a trademark and the exclusive use of it be entitled to legal protection"). The law that a generic mark may be cancelled at any time is based in the idea that "one competitor will not be permitted to impoverish the language of commerce" by depriving others of use of a generic term. Anti-Monopoly Inc. v. General Mills Fun Group, 611 F.2d 296 (9th Cir. 1979) and 684 F.2d 1316 (9th Cir. 1982), cert.den.; cf. Coca-Cola Co. v. Koke Co., 254 U.S. 143 (1920)(upholding Coca-Cola's mark on "Coke", and rejecting its claim of right

This principle is essential to any understanding of free speech. If government could give away control of words, for whatever good purposes, the national treasury of language and the First Amendment itself would be markedly diminished by each gift.

This Court has recognized the relationship between the trademark law principle that generic words cannot be trademarked and the important First Amendment-based idea that Congress cannot impoverish the language by withdrawing generic words from it. In Park 'N Fly v. Dollar Park 'N Fly, supra, 105 S.Ct. at 665, eight members of this Court agreed that there need be no fear that the Lanham Act "might take from the public domain language that is merely descriptive" because "[t]he Lanham Act allows a mark to be challenged at any

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to prevent competitors from using the word "dope", which "does not suggest

time if it becomes generic, and, under certain circumstances, permits the non-trademark use of descriptive terms contained in an incontestable trademark."

The Oxford English Dictionary (2-vol. ed. 1971) states that the first "Olympiad", consisting of ancient Greek athletic events by which the Greek calendar first was synchronized, occurred in 776 B.C., and the words "Olympic" and "Olympiad" date from that period in history. The O.E.D. defines "Olympic" both as an adjective and as a noun. As an adjective, "Olympic" is "1. of or belonging to Olympus; Olympian; celestial", and "2. of or belonging to Olympia in Elis...in which the most famous games of ancient Greece (the Olympic games) were celebrated in honour of the Olympian Zeus". As a noun,

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Coca-Cola by similarity" and as to which "there is no ground upon which the

"Olympic" means "[a]n Olympic game, usually in pl[ural]." The O.E.D. does not mention the 20th century International Olympic Games, but it does contain literary references to "Olympics" occurring at marketplaces, fairs, fish sales and (poetically) in Parliament throughout the past several centuries. The generic nature of this ancient classifying word "olympic" is obvious.

Petitioners assert that the doctrines that generic words may not be trademarked and that a party may use a trademarked term in good faith to describe its goods or services represent a balance between free speech and trademark regulation interests. Petitioners contend that these protections have a solid First Amendment core, protecting the national vocabulary against private ownership that would

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plaintiff can claim a personal right to exclude" other users).

otherwise be possible by trademarking generic words and enjoining fair uses in description. That First Amendment core is severely menaced by the Court of Appeals' opinion, holding that Congress can give away generic, idea-conveying words for good causes by bestowing "trademark-pluses" as to them upon chosen entities.

III. THE BLURRING OF THE DISTINCTION BETWEEN COMMERCIAL AND NON-COMMERCIAL SPEECH ACCOMPLISHED BY THE DECISION OF THE COURT OF APPEALS CREATES SIGNIFICANT CONFUSION AS TO THE SCOPE OF FIRST AMENDMENT PROTECTION TO BE AFFORDED TO NON-PROFIT CORPORATIONS AND OTHERS INCIDENTALLY ENGAGED IN COMMERCE AND PRIMARILY ENGAGED IN COMMUNICATIVE ACTIVITIES THAT ARE SUPPOSED TO BE FULLY PROTECTED BY THE FIRST AMENDMENT.

The Court of Appeals' opinion characterizes SFA&A's nonprofit and essentially ideological use of "olympic" as commercial speech. That characterization is grossly erroneous. According to the decisions of this Court,

"commercial speech" is that which "proposes a commercial transaction". Bolger v. Youngs Drug Products Corp., 103 S.Ct. 2875, 2879 (1983). The incidental monetary transactions occurring when "Gay Olympics I" sponsors used "olympic" on their posters and t-shirts, which were sold to raise money for their nonprofit corporate cause, do not fit within this Court's definition of commercial speech.

Speech containing a subsidiary commercial element is not thereby transformed into the less protected form, "commercial speech". Murdock v. Pennsylvania, 319 U.S. 105 (1943)("The mere fact that the religious literature is 'sold' by itinerant preacheres rather than 'donated' does not transform evangelism into a commercial enterprise."); New York Times v. Sullivan, 376 U.S. 254 (1964)(paid

advertisement does not lose its First Amendment protection, for its content of political and ideological speech, because of the subsidiary fact that the advertisement was paid for). Indeed, contributing money to political and public interest causes itself is a protected form of expression, see e.g., First National Bank v. Bellotti, 98 S.Ct. 1407 (1978); Buckley v. Valeo, 424 U.S. 1 (1976). These case precedents of this Court firmly establish that exercises of First Amendment free expression need not be "free" in the monetary sense to receive full protection under the First Amendment. To hold otherwise, as the Court of Appeals has done in the instant case, is to ignore the poignant contemporary reality that free speech often costs money, both to the speaker and the audience, whether for television

time to air a message, for a seat in the auditorium where "Hair" is being shown, or for some property (a t-shirt, a button, a book) that contains and symbolizes the message being conveyed.

IV. THE HOLDING THAT USOC IS NOT ENGAGED IN STATE ACTION CONFLICTS WITH ANOTHER NINTH CIRCUIT DECISION AS TO USOC, AS WELL AS ABANDONING THE DECISIONS OF THIS COURT THAT ARE SUPPOSED TO GOVERN WHAT STATE ACTION IS AND HOW COURTS ARE TO DETECT ITS PRESENCE.

The analytical process supposedly required to determine "state action", Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961), was bypassed in the case at bar. The trial court glossed over the disputed issue of fact as to USOC's state action and granted it summary judgment. (App.4,6) The Court of Appeals hurriedly leaped the "state action" hurdle in its determination to avoid the "difficult issue of

applicability of equal protection guarantees" and to avoid determining if USOC discriminated. (App.1) Thus, USOC, an entity created and chartered by Congress, given powers to perform an array of public functions relative to amateur athletics throughout the nation and relative to U.S. participation in the Olympic Games, and given public resources including sizeable sums of money and an unprecedented "trademark" upon a generic term, was held not to be engaged in "state action". 36 U.S.C.secs. 371 et seq. (Dkt.58, establishing that the federal government gave USOC at least $16,300,000. from 1980 forward to perform public functions). The "state action" tests developed by this Court, giving a prominent place to each of the factors present in this case---public money, governmental functions, establishment by

government--- appear to have been cast aside at bar. Burton, supra; Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Evans v. Newton, 382 U.S. 296,299 (1966); Marsh v. Alabama, 326 U.S. 501 (1946).

The Court of Appeals' holding as to the absence of state action also squarely conflicts with its contrary holding that USOC was engaged in "state action", in its participation in staging of the International Olympic Games at Los Angeles. Martin v. IOC, 740 F.2d 670, 677 (9th Cir. 1984).

The issue of state action especially deserves more consistent and sensitive handling than afforded at bar where the entity is challenged as a purported state actor engaged in what the challenger claims to be invidious discrimination. Cf. Martin v. IOC, supra; Fortin v. Darlington Little League, 514 F.2d 344,

347-348 (1st Cir. 1975). (Little League, chartered by Congress, was held to be engaged in state action when it used public resources to provide softball games for boys only). USOC's openly discriminatory selection of the Special, Junior and Explorer Olympics for its blessing, and its tacit permission to dozens of other Olympics including an International Police Olympics, combined with its total suppression of use of "Olympics" by gay persons for their discrete public interest purposes, would constitute a blatant case of invidious discrimination in violation of the equal protection guarantee, if USOC were held to be doing state action. Police Department of the City of Chicago v. Mosley, 408 U.S. 92, 95-99 (1972); City of Oklahoma City School Board v. National Gay Task Force, 729 F.2d 1270

(10th Cir. 1984), aff'd. by equally divided court, 53 U.S.L.W. 4408 (1984). Organization for A Better Austin v. O'Keefe, 402 U.S. 415, 416-419 (1971); Saia v. New York, 334 U.S. 558, 560-561 (1948)(where the "right to be heard is placed in the uncontrolled discretion of the Chief of Police", city ordinance invoked to prohibit Jehovah's Witnesses from using loudspeakers established an unconstitutional prior restraint).

Surely if loudspeakers and leaflets and public places for speech are "indispensable instruments of effective public speech", Saia, supra, 334 U.S. at 561, words themselves are at least as vital. Where, as in the case at bar, an entity empowered by Congress to control use of a word does so in a discriminatory and speech-suppressing fashion, it seems necessary to the integrity of the state

action concept itself to look far more carefully to determine whether it is the hand of government that is falling over the mouthes of those being enjoined from speaking. After all, the state action concept is the gateway to protection under the Bill of Rights; that gateway should not be casually blocked by the sort of incautious state action precedent that the Court of Appeals has made at bar.

V. THE INJUNCTION AT BAR CONSTITUTES A PRIOR RESTRAINT THAT IS IRRECONCILABLE WITH THE FIRST AMENDMENT DECISIONS OF THIS COURT, INCLUDING ITS COMMERCIAL SPEECH DECISIONS.

The injunction granted in this case and upheld on appeal prohibits SFA&A, Dr. Waddell and all persons associated with them from using "Olympic" in virtually any context.(App.6) If petitioners are correct that their uses of "Olympic" constitute ideological speech deserving

the fullest protection under the First Amendment, the injunction against those uses constitutes a classic prior restraint, prohibiting particular speech based solely upon its content.[4] USOC in this case has failed to meet anything resembling the "burden" that "must rest on the censor", Southeastern Promotions, supra. Oppositely, based on a conclusory and factually unsupported assertion of trademark infringement, USOC has accomplished absolute and prohibitory

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4 Even where asserted interests that are arguably far stronger than USOC's interest in raising money for U.S. participation in the Olympics have been presented in support of prior restraints, they have not satisfied this Court. See, e.g., New York Times v. United States, 403 U.S. 713, 714 (1971) (national security); Hynes v. Mayor, 425 U.S. 610 (1976)(privacy and peace in the home); Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 553 (1975)(obscenity); Carroll v. Princess Anne, 393 U.S. 175, 183 (1968)(public safety); Spence v. Washington, 418 U.S. 405 (1974)(sanctity of the U.S. flag); Near v. Minnesota, 283 U.S. 697(1931)(public nuisance).

governmental involvement, by way of a judicially ordered injunction, in what petitioners contend is nothing less than political, symbolic and ideological speech.

Even if petitioners' use of "olympic" could properly be deemed commercial speech, the evidence to the contrary notwithstanding, the Court of Appeals failed to follow controlling precedents requiring balancing of interests in commercial speech cases. It is true that a court may act to protect the private holder of a property right against invasion of that property right by a "speaker". Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 563 (1977)(First Amendment held not to permit news broadcaster to show "entire act" of petitioner human cannonball

without compensating him, where petitioner "does not seek to enjoin the broadcast of his performance".)). The power of a court to protect a trademark, of course, also includes the power to enjoin infringing uses in proper cases. Park 'N Fly v. Dollar Park 'N Fly, supra, 105 S.Ct. at 667; Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 206-207 (2d Cir. 1979); 15 U.S.C.sec. 1116.

Nevertheless, even where commercial speech is concerned, any injunctive relief is supposed to be tailored to avoid suppression of protected speech. Matter of R.M.J., 102 S.Ct. 929, 937-939 (1982); Consumers Union of United States v. General Signal Corp., 724 F.2d 1044 (2d Cir. 1983); Better Business Bureau v. Medical Directors, 681 F.2d 397 (5th Cir. 1982). In the case presented here,

petitioners have offered to place the disclaimer "not associated with the United States Olympic Committee or any Olympic activity" on all of their properties and paraphernalia alongside the word "Olympic". Assuming arguendo that SFA&A's use possibly could be held commercial and trademark-infringing speech, this disclaimer would have struck the correct balance of speech and regulatory interests, especially where no proof of confusion was adduced and no harm to USOC ever was proved. No basis for the injunction prohibiting petitioners from essentially any use of "Olympic", and thus foreclosing this balanced approach to solving the problem, has been presented in this case.

In upholding the speech-suppressing injunction at bar, the Court of Appeals ignored the clear precedents of this

Court requiring that where disclaimers suffice to accomplish the governmental purpose of preventing misleading or deceptive speech, and especially where there are competing interests in permitting some speech, injunctions violate First Amendment guarantees. This precedent of the Court of Appeals promises to spawn other similarly unconstitutional injunctions, absent review by this Court. The position of this Court that injunctive relief should not be ordered where less intrusive relief suffices, Doe v. Bolton, 410 U.S. 179, 200 (1973), must be vindicated here, especially if petitioners are correct that the injunction restrains speech and enforces an apparent discrimination.

VI. IF THE AMATEUR SPORTS ACT BESTOWED NOTHING MORE OR LESS THAN AN INCONTESTABLE TRADEMARK AS TO "OLYMPIC" UPON USOC, THEN THAT INTERPRETATION SHOULD BE HARMONIZED WITH THE LANHAM ACT.

If petitioners are correct that Congress intended to bestow, and at most had constitutional authority to bestow, a trademark as to "olympic" upon USOC, then the Court of Appeals' decision cannot be squared with the obligation of the federal judiciary to render statutory interpretations that harmonize the provisions of pre-existing statutes wherever feasible. The Court of Appeals' determinations that USOC need not prove that SFA&A's use of "olympic" tended to cause confusion, 36 U.S.Code section 380(a)(4), and that SFA&A could not use "olympic" fairly to describe its planned activities, despite 15 U.S.Code section 1115(b)(4), wholly contradict principles

that have been refined over decades of Lanham Act litigation.

Under the Lanham Act, likelihood of confusion, the exception for fair use in description, the non-trademarking intent of the user, and the wilfulness of any asserted infringement for purposes of awards of attorneys fees are questions of fact. Petitioners assert that there is no statutory reason under section 380 of the Amateur Sports Act to subvert the litigative process of factual inquiry normally associated with these issues, where USOC claims trademark infringement as to uses of "olympic". USOC has had no trouble enforcing its trademark as to "olympic" against commercial infringers. USOC v. Intelicense Corp., 737 F.2d 263, 267 (2d Cir. 1984), cert.denied; USOC v. Union Sports Apparel, 220 U.S.P.Q. 526 (E.D.Va. 1983).

As argued above, the free speech interests that are embedded in the generic terms and fair use doctrines of trademark law make it all the more appropriate that parties accused of infringing "olympic", such as petitioners, be accorded a meaningful day in court, so that free speech interests and trademark interests are properly balanced in accordance with the will of Congress. Accordingly, petitioners contend that an additional and important reason for this Court to take review of this case is to render an interpretation of the Amateur Sports Act of 1978 that conforms to trademark law requirements developed in decades of litigation under the Lanham Act, including the requirement that attorneys' fees shall only be awarded in an exceptional case, where the infringement is wilful, deliberate,

fraudulent or malicious and where equity supports the award.

VII. CONCLUSION

In its decision at bar, the Court of Appeals failed to follow basic constitutional and trademark law principles. In that failure, the Court of Appeals' opinion creates a monster, casting a long and chilly shadow over the relationship between trademarks and the Constitution, and provoking free speech and equal protection problems in a vital part of the relationship between people and government. Every author, speaker, artist and non-profit organizer is negatively affected by the Court of Appeals' decision, which conflicts so openly and unnecessarily with the rules of federal statutory interpretation, with precedents defining the boundaries upon

commercial and ideological speech and with trademark principles.

A holding by the Court of Appeals that section 380 grants a trademark only, and that its application to any alleged trademark infringer must be reconciled with the Lanham Act, would have fully served Congress' legitimate and permissible purpose of giving USOC a means of raising funds by bestowing a trademark upon it. Instead the Court of Appeals has gone to the distant extreme, in both trademark and constitutional law terms, of holding that Congress had the intent and authority to bestow almost absolute control in both commercial and ideological speech realms of a generic and widely popular term upon a Congressionally chartered entity, to do with as it pleases while calling its power a "trademark", that is subject to

no trademark law burdens of proof or defenses. It must also be noted in this regard that the entity Congress empowered, USOC, has been granted a monopoly in governance of amateur athletics in the same Act. 36 U.S.Code sections 371 et seq. This fact intensifies the harm done by the Court of Appeals' decision.

The interpretation of 36 U.S.Code section 380 rendered by the Court of Appeals raises surpassingly crucial questions as to the boundaries of Congressional power relative to both trademarks and the Bill of Rights, and creates major conflicts with case precedents that should have defined those boundaries. The fundamentally important issues of the relationship of those trademark principles to the Constitution, as well as the questions of state action,

invidious discrimination and the propriety of injunctive relief that are raised by the Court of Appeals' opinion, merit review by this Court.

DATED: August 15, 1986

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INTERNATIONAL OLYMPIC COMMITTEE, a corporation organized and existing under the laws of Switzerland; UNITED STATES OLYMPIC COMMITTEE a corporation organized and existing under the laws of the United States of America,	82-4467 D.C.# C-82-4183-RFP OPINION
Plaintiffs-Cross-Defendants-Appellees	
vs.	
SAN FRANCISCO ARTS & ATHLETICS, and Thomas P. Waddell,	
Defendants-Cross-Appellants-Cross-Plaintiffs.	

Argued and Submitted
June 11, 1985.
Decided Jan. 27, 1986.

Before GOODWIN and WALLACE, Circuit Judges, and STEPHENS, District Judge.*

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* The Honorable Albert Lee Stephens, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

GOODWIN, Circuit Judge.

This case arises out of the San Francisco Arts and Athletics' (SFAA) use of the phrase "Gay Olympics" to describe an athletic competition it sponsored. The United States Olympic Committee (USOC) and the International Olympic Committee (IOC) brought suit under the Amateur Sports Act of 1978, codified at 36 U.S.C. §§371-96 (1982), against SFAA and various individuals to restrain the use of "Olympics" to describe the event. Plaintiffs also made various related claims, which were not subsequently pressed, and are no longer in the case. The district court issued a temporary restraining order and then a preliminary injunction, which was affirmed by this court. After further proceedings in the district court, summary judgment and a permanent in-

junction were awarded to USOC and IOC. Defendants appealed from the judgment and injunction and an award of attorneys' fees. The appeals were consolidated and are now before us. We affirm the summary judgment and injunction, but reverse and remand the award of attorneys' fees.

I. The Amateur Sports Act Claim

A. The Act

The Amateur Sports Act of 1978 confers a corporate charter on USOC and gives that body certain rights in the word "Olympics" and related symbols. The act provides:

> (a) Without the consent of [USOC], any person who uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition --
>
> . . . .

> (4) the words "Olympic," "olympiad," "Citius Altius Fortius," or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with [USOC] or any Olympic activity;
>
> shall be subject to suit in a civil action by the [USOC] for the remedies provided in the Act of July 5, 1946 (60 Stat. 427; popularly known as the Trademark Act of 1946)....

36 U.S.C. §380(a)(4)(1982).

It is uncontested that SFAA used "Olympic" in the promotion of its games. This use involved not only the advertising of the games, but the selling of products with the word "Olympic" on them. Because confusion between USOC's use and SFAA's use was a disputed question of fact, the summary judgment can be sustained only if the Act does not require confusion.

SFAA argues that §380(a)(4) can only be read as requiring confusion between uses because the "tending to cause confusion" language must be applied to the whole clause. USOC argues that confusion is an element of a claim under the clause only where a simulation is used rather than the proscribed words and symbols.

The difficulty with SFAA's argument is that when §380 was adopted, it replaced a provision prohibiting the use of the protected words or any combination of them. See 36 U.S.C. §379 (1974)(amended 1978). Section 380 was intended to make the civil remedies of the Trademark Act of 1946 available to USOC and to give USOC the exclusive right to market licenses for use of the protected words and symbols. See H.R. Rep. No. 1627, 95th Cong., 2d Sess.

1978, 8-10, 15, 37, reprinted in 1978 U.S. Code Cong. & Ad.News 7478-95. See also United States Olympic Committee v. Intelicense Corp., 737 F.2d 263, 266-67 (2d Cir.), cert. denied, --- U.S. ---, 105 S.Ct. 387, 83 L.Ed.2d 321 (1984)(false association with the USOC not required); United States Olympic Committee v. International Federation of Bodybuilders, 219 U.S.P.Q. 353, 361 (D.D.C.1982)(likelihood of confusion that goods or services stem from USOC not required). Other courts have remarked on the need to insure the market value of licenses for the use of Olympic symbols. See Stop the Olympic Prison v. United States Olympic Committee, 489 F.Supp. 1112, 1120 (S.D.N.Y. 1980). In view of the pre-existing criminal sanction that prohibited non-confusing uses and the intent to broad-

en USOC's protection and to ensure its power to license the symbols and words, we conclude that confusion is unnecessary.

SFAA also raises various Lanham Act defenses. When Congress adopted the Amateur Sports Act, it provided that Lanham Act remedies would be available to USOC. It omitted any provision for Lanham Act defenses. In light of the purpose of the Act, which gives the USOC more power than any ordinary trademark holder by allowing it to prohibit non-confusing uses, and the express inclusion of Lanham Act defenses in a similar statute, see The Trademark Counterfeiting Act of 1984, Pub.L. No. 98-473, §1502(a), 98 Stat. 1837, 2178-79, codified at 18 U.S.C.A. §2320(c) & (d)(1)(B)(West.Supp.1985), we conclude Congress' omission was

intentional. As a result, the Lanham Act defenses raised are irrelevant.

B. Application

SFAA claims that even if the statute was intended to bar the use of the word "Olympics" notwithstanding a confusing effect, the application of the statute to SFAA is unconstitutional.

SFAA's first argument is based on the equal protection component of the Fifth Amendment due process clause. It argues that USOC has discriminated between homosexual groups and others in determining against whom to enforce its rights in "Olympic." It cites numerous other competitive games advertised as "Olympics" which have gone unchallenged by USOC. USOC denies discrimination and adduces other litigation by it, albeit begun after SFAA made a claim of discrimination in the instant case.

We need not resolve the difficult issue of the applicability of equal protection guarantees or determine whether USOC discriminated because we find the absence of governmental involvement in the alleged discrimination dispositive. SFAA argues that the judicial enforcement of the Olympic Committee's rights constitutes sufficient involvement, citing Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). However, in the absence of special benefit flowing to the state from the challenged action, see Burton v. Wilmington Parking Authority, 365 U.S. 715, 724, 81 S.Ct. 856, 861, 6 L.Ed.2d 45 (1961), state action will not be found unless there was a governmental decision to violate rights. Therefore, state enforcement of private rights generally will not

itself meet the state action requirement. See Cobb v. Georgia Power Co., 757 F.2d 1248, 1251 (11th Cir.1985). That the United States conferred special property rights in USOC's trademarks does not make USOC's exploitation of those rights state action. Many property rights, such as ordinary trademarks and copyrights, see, e.g., Walt Disney Productions v. Air Pirates, 345 F.Supp. 108, 115-16 (N.D.Cal.1972), aff'd in relevant part, 581 F.2d 751, 758-59 (9th Cir.1978), cert. denied, 439 U.S. 1132, 99 S.Ct. 1054, 59 L.Ed.2d 94 (1979) or the right to exclude, see Hudgens v. NLRB, 424 U.S. 507, 512-21, 96 S.Ct. 1029, 1032-37, 47 L.Ed.2d 196 (1976), can be enforced to limit protected speech without violating the Constitution because there is no state action. While SFAA's claims

that the government financed USOC and jointly marketed Olympic medals with it are more persuasive, Rendell-Baker v. Kohn, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982), makes clear that neither financing nor contractual relationships by themselves suffice to make a private entity a governmental actor. Id. at 840-41, 102 S.Ct. at 2770-71.

SFAA also appears to argue that by barring non-confusing speech, the Act violates the rights of commercial speech under the First Amendment. See Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 563-64, 100 S.Ct. 2343, 2350, 65 L.Ed.2d 341 (1980). Ordinary trademark actions are based on a finding of confusion of products, and hence of misleading speech, and SFAA claims this

limit is constitutionally imposed. However, the word "Olympic" and its associated symbols and slogans are essentially property. Such property rights can be protected without violating the First Amendment. See Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 573-77, 97 S.Ct. 2849, 2856-58, 53 L.Ed.2d 965 (1977)(property rights in performance of human cannonball act may properly receive priority over First Amendment rights of broadcaster), Hudgens v. NLRB, 424 U.S. 507, 518-21, 96 S.Ct. 1029, 1035-37, 47 L.Ed.2d 196 (1976)(state private property rights defeat claim to speak freely on the property of another). The Supreme Court has approved the decisions of federal trial courts upholding the exclusive right to use literary works against First Amendment chal-

lenge. See Sacchini, 433 U.S. at 576-77 & 577 n. 13, 97 S.Ct. at 2857-58 & 2858 n. 13. Because SFAA had satisfactory alternative means for expressing its opposition to the Olympics, it has no First Amendment right to use "Olympics" or the Olympic symbols to promote its games or products.

C. Relief Awarded

The district judge granted USOC a permanent injunction against SFAA's use of the name. SFAA argues that declaratory relief or a narrower injunction would be more appropriate. It is undisputed that the SFAA resumed use of the Olympics trademark without disclosure to the Olympic Committee. While the scope of an injunction is initially left to the discretion of the trial court, see SEC v. Arthur Young & Co., 590 F.2d 785, 787 (9th Cir.1979),

the court must apply the rule that injunctions are not awarded if any lesser relief will protect the trademark holder. See AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341, 354 (9th Cir.1979). While review of a preliminary injunction is relatively deferential, review of a permanent injunction is stricter because the parties have had a change to present their arguments, making error easier to discern. See Sports Form, Inc. v. UPI, 686 F.2d 750, 752 (9th Cir.1982); Miss Universe, Inc. v. Flesher, 605 F.2d 1130, 1133 (9th Cir.1979). Abuse of discretion occurs if the district court rests its conclusion on clearly erroneous factual findings or if its decision relies on erroneous legal conclusions. See Sports Form, 686 F.2d at 752; Miss Universe, 607 F.2d at 1133-34. In this

case the facts are undisputed and the district court correctly stated the applicable law. Furthermore, while a declaratory judgment might have sufficed, providing injunctive relief was not, given SFAA's past use of the protected words and symbols, an abuse of discretion. The injunction merely tracks the statute, and so is not overbroad.

The district court also awarded the plaintiffs attorneys' fees under the Amateur Sports Act. Violation of the Act subjects the violator "to suit in a civil action by [USOC] for the remedies provided in the Trademark Act." 36 U.S.C. §380(a)(1982). USOC contended in the district court that the reference to the Lanham Act remedies was intended as a shorthand for an earlier provision providing for an

award of attorneys' fees in the court's discretion. The district court found it unnecessary to resolve the question, deciding that the defendants' actions satisfied the stricter requirement of the Lanham Act. On appeal, USOC argues that the defendants' conduct fits within the requirements of the Lanham Act. Cf. United States Olympic Committee v. Union Sport Apparel, 220 U.S. P.Q. 526, 529 (E.D.Va. 1983)(using Lanham Act standards). Therefore, we must discuss the applicability of the

Lanham Act to the defendants' conduct.[1]

The last sentence of 15 U.S.C. §1117 (1982) provides, "The court in exceptional circumstances may award reasonable attorneys' fees to the prevailing party." The "may" has been generally considered as making the award discretionary even if it fits within the statutory standard of an exceptional circumstance. See Transgo,

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[1] In a footnote in its brief, USOC refers to an argument that the trial court has discretion under the Amateur Sports Act to award fees without first making a finding of "exceptional circumstances." Because this case has been briefed and argued on the theory that there were (or were not) exceptional circumstances, we take the briefs as submitted and limit our review to the issues set forth in the briefs as required by Fed.R.App.P. 28(a)(2). See 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure §3974 (1977). But see International Union of Bricklayers & Allied Craftsmen Local Union No. 20 v. Martin Jaska, Inc., 752 F.2d 1401, 1404 n. 4 (9th Cir.1985).

Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1014 (9th Cir.1985); Sealy, Inc. v. Easy Living, Inc., 743 F.2d 1378, 1384 (9th Cir.1984); Jellibeans, Inc. v. Skating Clubs of Georgia, Inc., 716 F.2d 833, 846-47 (11th Cir.1983).

The statute itself contains no definition of what constitutes "exceptional circumstances." The Senate Report says that exceptional circumstances include conduct that is "'malicious,' 'fraudulent,' 'deliberate,' or 'wilful.'" S.Rep. No. 1400, 93d Cong., 2d Sess. 2, reprinted in 1974 U.S. Code Cong. & Ad.News 7132, 7133. This circuit has adopted this standard. See Sealy, Inc. v. Easy Living, Inc., 743 F.2d at 1384, Playboy Enterprises v. Baccarat Clothing Co., Inc., 692 F.2d 1272, 1276 (9th Cir.1982).

The trial court awarded attorneys' fees on the theory that the SFAA intentionally used the word "Olympic" in a manner that violated the statute and knew there was a risk the statute would be violated. The court rejected SFAA's claim that the "quality of the defense" that SFAA interposed to the action was relevant to a determination of its willfulness.

We believe that the rule defining willful infringement in patent cases is instructive. Cases construing willful infringement in patent areas apply the rule that one "who reasonably doubted that the patent was valid has not willfully infringed." Lam, Inc. v. Johns-Manville Corp., 668 F.2d 462, 474 (10th Cir.), cert. denied, 456 U.S. 1007, 102 S.Ct. 2298, 73 L.Ed.2d 1302 (1982). Cf. United States Olympic

Committee v. Union Sport Apparel, 220 U.S.P.Q. at 529 (attorneys' fees particularly appropriate where "expenses were caused by a recalcitrant defendant without a substantial defense"). A rule awarding fees similar to that adopted in patent cases accords with Congress' intention to eliminate the disparity in patent and trademark cases by amending the Lanham Act to provide for fees. See S.Rep. No. 1400, 93d Cong. 2d Sess. 2, reprinted in 1974 U.S.Code Cong. & Ad.News 7132, 7133. See also 35 U.S.C. §285 (1982)("exceptional cases" test for patent cases).

Given statements in the only prior case, Stop the Olympic Prison v. United States Olympic Committee, 489 F.Supp. 1112 (S.D.N.Y.1980), SFAA might have reasonably thought that its proposed usage was not barred by the statute.

Its claims of discrimination by the USOC might be found to be reasonable, considering the proliferation of other groups using the restricted words. While the USOC was not sufficiently identified with the federal government to subject the Committee to the equal protection component of Fifth Amendment due process, the argument that there was state action might not be considered insubstantial. These issues should be considered by the district court in the first instance.

Local Rule 270 of the Northern District of California requires that the parties discuss disputed issues relating to attorneys' fees and requires the movant to file declarations detailing the amount of time spent and the qualifications of counsel. SFAA argues that plaintiffs' beach of this

rule bars them from claiming fees. However, SFAA's representatives refused to meet with plaintiffs for the purpose of supplying the information required by the local rule, apparently because they feared that this would compromise SFAA's position that no attorneys' fees should be awarded. Under the circumstances, we regard the district court's rulings as an implicit finding that there had been a waiver of the local rule. In light of subsequent affidavits providing further information, the district court's ruling is not clearly erroneous, and must be accepted.

We remand for further proceedings to determine whether the defendants' conduct was sufficiently exceptional under the Sealy case to make an award of attorneys' fees justifiable. Although the issue was briefed and ar-

gued, we express no opinion on the amount of the award.

The standard for allowing fees is provided by Kerr v. Screen Extra's Guild, Inc., 526 F.2d 67, 70 (9th Cir.1975), cert. denied, 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976). When the record does not permit adequate review because there is no showing that the time actually spent was reasonably necessary, the district court has no reviewable basis for finding that the awards were reasonable and necessary. As the Sealy court noted, "[t]hough the fee actually charged to the client may be an important factor, 'whether or not [the client] agreed to pay a fee and in what amount is not decisive.... The criterion for the court is not what the parties agreed but what is reasonable.'"

743 F.2d at 1385 (alterations and ellipsis in original; citations omitted).

On remand, the trial court should determine how much of the work was reasonably necessary. Most of the counts advanced by plaintiffs appear to have been ignored after the initial pleading. Plaintiffs' primary argument in its motion for attorneys' fees has been abandoned on appeal. If, after a Kerr and Sealy hearing, fees are to be awarded, the court should examine both the reasonableness and necessity for the rather impressive amount of time accumulated on this case.

The injunction is affirmed with costs. The fee award is vacated and remanded.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INTERNATIONAL OLYMPIC COMMITTEE, a corporation organized and existing under the laws of Switzerland; UNITED STATES OLYMPIC COMMITTEE, a corporation organized and existing under the laws of the United States of America,	)	Nos. 84-1759 and 84-2528
	)	D.C. No. C82-4183 JPV
	)	ORDER
Plaintiffs-Cross-Defendants-Appellees,	)	
vs.	)	
SAN FRANCISCO ARTS & ATHLETICS, and Thomas P. Waddell,	)	
Defendants-Cross-Plaintiffs-Appellants.	)	

Filed January 27, 1986

BEFORE: GOODWIN and WALLACE, Circuit Judges, and STEPHENS, District Judge*

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* The Honorable Albert Lee Stephens, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

Upon petition for rehearing and suggestion for rehearing en banc, the panel has voted to amend its opinion entered herein January 27, 1986, as follows:

On page 6, end of line 11 of the typewritten opinion (page 8, line 2, of the printed slip opinion), insert footnote marker 1/ and the following text:

> SFAA contends that our finding of no state action conflicts with Martin v. International Olympic Committee, 740 F.2d 670, 677 (9th Cir. 1984). We disagree. The determination whether state action exists is entirely dependent on the unique facts of each case. Burton v. Wilmington Parking Authority, 365 U.S. 715 726 (1961). In Martin, the government involvement was significantly more extensive than that found in this case.

On page 8 of the typescript opinion (page 9 of the printed slip opinion), renumber the footnote to 2/.

The full court was advised of the suggestion for rehearing en banc. An active judge called for a vote on whether to rehear the matter en banc. The request for en banc consideration failed to receive a favorable majority of the votes of the active judges.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INTERNATIONAL OLYMPIC COMMITTEE, a corporation organized and existing under the laws of Switzerland; UNITED STATES OLYMPIC COMMITTEE, a corporation organized and existing under the laws of the United States of America,	)	84-1759 84-2528 DISSENT
Plaintiffs-Cross-Defendants-Appellees,	)	
vs.	)	
SAN FRANCISCO ARTS & ATHLETICS, and Thomas P. Waddell,	)	
Defendants-Cross-Plaintiffs-Appellants.	)	

Filed May 28, 1986

KOZINSKI, Circuit Judge, with whom Circuit Judges PREGERSON and NORRIS join, Dissenting.

I.

This case was brought by the United States Olympic Committee (USOC) and others under the Amateur Sports Act of 1978 (the Amateur Act), 36 U.S.C. §§371-396 (1982), to enjoin the use of the word "Olympic" by appellants, San Francisco Arts & Athletics (SFAA) in connection with an event to be known as the Gay Olympic Games. USOC is a private nonprofit corporation chartered by Congress, 36 U.S.C. §§371, 377 (1982); SFAA is a nonprofit corporation. The Gay Olympic Games SFAA intended to sponsor in 1982 (and again in 1986), were "designed to combat homophobia and to work for the health and tolerance of gay and lesbian persons." Pet. Reh. 2.

A panel of this court upheld a permanent injunction issued after summary judgment had been granted to

USOC. International Olympic Committee v. San Francisco Arts & Athletics, 781 F.2d 733 (9th Cir. 1986). For the reasons stated below, I find the panel's reasoning squarely at odds with controlling Supreme Court authority. Moreover, the result reached threatens a potentially serious and widespread infringement of personal liberties. I therefore would vacate the panel's opinion and set the case for rehearing en banc.

A. As the panel interprets the Amateur Act, the USOC is given the exclusive right to use the word Olympic "for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition," 36 U.S.C. §380, whether undertaken for profit or for a nonprofit purpose. The

USOC may obtain an injunction against use of this term without showing likelihood of confusion and without overcoming the defenses normally available in trademark infringement actions under the Lanham Act. 781 F.2d at 736.

Interpreted in this fashion, the Amateur Act represents a sweeping exercise of sovereign power, implicating by principles of individual liberty protected by our Constitution. By passing the Act, Congress extracted a word from the English language and gave it to a private party to use in connection with any commercial endeavor or public event. This raises serious first amendment concerns that the panel failed to address or acknowledge.

By word Olympic has a meaning unique within our language. It connotes open and intense competition among non-

professional athletes, usually involving the best and most accomplished contestants. Thus, we have Special Olympics, Junior Olympics, Police Olympics, even Canine Olympics, normally involving competition among the best and finest within the denoted category. I have great difficulty with the idea that Congress can deny all of us that word, and the ideas it embodies, in connection with all public endeavors. As noted by Justice Harlan in Cohen v. California, 403 U.S. 15, 26 (1971), "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." The ideas embodied in the word Olympic can, of course, be expressed by other means, but only in a much clumsier fashion, without the same

nuance of meaning. As Justice Harlan wrote in Cohen,

> much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

Id. at 26.

In organizing the Gay Olympic Games, the SFAA sought to "'creat[e] a more realistic image of homosexual men and women in all societies' and to 'provid[e] more alternatives for homosexual men and women to move into the mainstreams of their respective.'"

International Olympic Committee v. San Francisco Arts & Athletics, 219 U.S. P.Q. 982, 985 (N.D.Cal.1982), aff'd mem., 707 F.2d 517 (9th Cir. 1983). The word Olympic was no doubt chosen to foster a wholesome, normal image of homosexuals. Denying SFAA use of the word thwarts that purpose. To say that the SFAA could have named its event "The Best and Most Accomplished Amateur Gay Athletes Competition" no more answers the first amendment concerns here than to suggest that Paul Robert Cohen could have worn a jacket saying "I Strongly Resent the Draft."

The Supreme Court has been extremely reluctant to approve restrictions against the use of particular words. See Cohen v. California, 403 U.S. 15 (1971); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85

(1977)(striking down a prohibition against posting "For Sale" and "Sold" signs on residential lawns). In the rare case when the Court has done so, it was only after the closest scrutiny and subject to the most careful restrictions. See, e.g., FCC v. Pacifica Foundation, 438 U.S. 726, 744-51 (1978) (FCC ban of patently offensive language justified because of special concerns pertaining to broadcasting). By contrast, the panel here dismisses SFAA's constitutional argument, simply by noting that "the word 'Olympic' and its associated symbols and slogans are essentially property. Such property rights can be protected without violating the First Amendment." 781 F.2d at 737 (citing Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 573-77 (1977); Hudgens v. NLRB, 424 U.S. 507, 518-21 (1976)). 35.

To say that the word Olympic is property begs the question. What appellants challenge is the power of Congress to privatize the word Olympic, rendering its unutterable by anyone else in connection with any product or public event, whether for profit or, as in this case, to promote a cause.

The rights conferred on the USOC by the Amateur Act are materially different from traditional intellectual property rights where a careful balance is struck between the interests of the property owner and those of the public. Trademarks,[1] copyrights,[2] and patents[3] are subject to a variety of statutory and common law defenses, and they reserve only those rights necessary to protect the owner's economic interests. Zacchini, upon which the panel relied, is instructive. The Court there was

careful to limit the relief afford petitioner (the human cannonball) to assuring that he "reap[s] the reward of his endeavors." 433 U.S. at 573. The Court twice noted that "[p]etitioner does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it." Id. at 578; see id. at 573-74.

By and large, rights in intellectual property are limited to uses that have been invented, created or developed by the owner. They are not a wholesale prohibition against all public uses but provide limited protection for that which "is the product of [the owner's] own talents and energy, the end result of much time, effort, and expense." Zacchini, 433 U.S. at 575. See Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S.Ct. 2218,

2223 (1985). So limited, rights in intellectual property are easily harmonized with the first amendment. See id. at 2228-31; Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977)(copyright); Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 206 (2d Cir. 1979)(trademark); J. Gilson, Trademark Protection and Practice, §5.09[5](1985); Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 UCLA L.Rev. 1180 (1970).

However, when cut loose from their conceptual moorings, intellectual property rights can raise serious constitutional concerns. Here, the Act's ironclad prohibition against every commercial or theatrical use of the word Olympic (unrestrained by the

need to show likelihood of confusion or to overcome Lanham Act defenses) stakes out an intellectual property fiefdom quite unlike anything we have seen in our law before.[4] By giving the USOC exclusive possession of the word, Congress has diminished the rights of everyone else, withdrawing from the public domain a term used by many and useful to more. If Congress has the power to grant a crown monopoly in the word Olympic, one wonders how many other words or concepts can be similarly enclosed, and the extent to which our public disclosure can thereby be impoverished. See Cohen v. California, 403 U.S. at 26.

B. My first amendment concerns are heightened by the way the USOC allegedly exercises its stewardship over the word Olympic. According to

the petition for rehearing "[t]he facts submitted below establish that USOC has openly permitted use of 'Olympic' both by groups that it directly supports, e.g. the Special Olympics, the Explorer Olympics and the Junior Olympics, and by groups that it has known to be using 'Olympic' and that it has elected not to sue, such as the 'International Police Olympics.'" Pet. Reh. 10.

Accepting SFAA's allegation, as we must, it seems that the USOC is using its control over the term Olympic to promote the very image of homosexuals that the SFAA seeks to combat: handicapped, juniors, police, Explorers, even dogs are allowed to carry the Olympic torch, but homosexuals are not. Troublesome as would be a total withdrawal of the term from public discourse, an exclusion that is invoked

pursuant to a subjective assessment of the wholesomeness of the proposed speaker or propriety of the proposed message is more troublesome still. See Police Department of Chicago v. Mosley, 408 U.S. 92, 99-102 (1972); Niemotko v. Maryland, 340 U.S. 268 (1951); Saia v. New York, 334 U.S. 558 (1948). Where the entity making the decision is private, unconstrained by principles of equal protection and due process, and entirely free of the discipline imposed by our political system, there are no safeguards whatsoever against arbitrary exclusion of certain groups because they wish to communicate ideas some may find offensive.[5] Under the panel's rationale the result would have been the same if appellants were blacks rather than homosexuals, and their claim were based on racism rather than homophobia.

II.

A. Once it is concluded that the first amendment is implicated by giving USOC the word Olympic, the next inquiry must be whether doing so directly advances a substantial governmental interest. Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 564, 566 (1980). If the Amateur Act prohibited only those uses likely to cause confusion or otherwise mislead the public, it would in all likelihood survive first amendment challenge. See Friedman v. Rogers, 440 U.S. 1, 13-15 (1979). However, the panel reads the Act as proscribing all unauthorized uses of the word Olympic, regardless of whether they would mislead the public, undermine USOC sponsored events or cause anyone any harm

whatsoever. The first amendment requires, at minimum, close scrutiny of the governmental interest served by such a broad prohibition.

Because the case was dismissed short of trial, we can only speculate as to what governmental interest is advanced by giving USOC such sweeping rights in the word Olympic. As the panel noted, however, "[o]ther courts have remarked on the need to insure the market value of licenses for the use of Olympic symbols." 781 F.2d at 736 (citing Stop the Olympic Prison v. United States Olympic Committee, 489 F.Supp. 1112, 1120 (S.D.N.Y. 1980)). See also International Olympic Committee v. San Francisco Arts & Athletics, 219 U.S. P.Q. 982, 985 (N.D. Cal. 1982), aff'd mem., 707 F.2d 517 (9th Cir. 1983); United States Olympic Committee v.

International Federation of Bodybuilders, 219 U.S.P.Q. 353, 356 (D.D.C. 1982). Apparently the Amateur Act serves as a type of subsidy to the USOC in lieu of direct financial support:

> The fundamental purpose of [the Amateur] Act was to safeguard the USOC"s ability to raise the financial resources that are a critical component of America's capacity to send world-class amateur athletes into international competition without the massive government subsidies enjoyed by competitors from other nations.

United States Olympic Committee v. Intelicense Corp., 737 F.2d at 264 (2d Cir.), cert. denied, 105 S.Ct. 387 (1984).

If this is the only interest supporting the USOC's monopoly, I seriously doubt whether it would justify even a [sic] minor a restriction on free speech. In words that seem to

address this very issue, Justice Marshall noted earlier this Term:

> While the interference with appellant's speech is, concededly, very slight, the State's justification -- the subsidization of another speaker chosen by the State -- is insufficient to sustain even that minor burden. We have held that the State may use its own resources for subsidization, Regan v. Taxation with Representation of Washington, 461 U.S. 540 (1983), but that interest, standing alone, cannot justify interference with the speech of others. See Buckley v. Valeo, 424 U.S. 1, 48-49 (1976)(per curiam); First national Bank of Boston v. Bellotti, 435 U.S. 765, 790-792 (1978).

Pacific Gas & Electric Co. v. Public Utilities Commission, 106 S.Ct. 903, 916 (1986)(footnote omitted)(Marshall, J., concurring).

B. Even if the government's interest in subsidizing the USOC were deemed sufficient to abridge some of

appellants' first amendment rights, we would still have to determine whether the broad monopoly granted by the Amateur Act "is not more extensive than is necessary top serve that interest." Central Hudson Gas, 447 U.S. at 566. Again, the cant record here makes that determination difficult, but the question is amenable to no simple answer. At the very least, it is necessary to consider whether USOC's commercial licenses could not be adequately protected by giving the USOC rights coextensive with those in the Lanham Act or by restricting its control over the use of the word Olympic in some other fashion. Or so, at least, do I read the Supreme Court's uniform pronouncements in this area. See, e.g., Police Department of Chicago v. Mosley, 408 U.S. 92, 101 n. 8 (1972) & authorities cited

therein; New York Times v. Sullivan, 376 U.S. 254, 279-83 (1963).

III.

While I hesitate to second-guess the panel's interpretation of the Amateur Act, I respectfully suggest that its conclusion that the USOC need not prove confusion or overcome Lanham Act defenses is not inevitable. If, as I suggest, the interpretation the panel adopts raises serious constitutional concerns, it may be appropriate to resort to a narrowing construction of the statute. See Regional Rail Reorganization Act Cses, 4129 U.S. 102, 134-36 (1974); United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 571 (1973). Because the panel failed to address what I see as the clear first

amendment implications of its decision, it did not consider the possibility of giving the Amateur Act a less sweeping interpretation.

IV.

By raising these concerns I do not necessarily conclude that the Amateur Act is irreconcilably at odds with the first amendment. Indeed, on this barren record I find it difficult to reach any but the most tentative conclusions about this highly unusual statute and its effect upon our personal liberties. What I find most troubling, however, is the haste with which appellants are being ushered out of court. The panel appears to have overlooked that where first amendment defenses are raised "[j]udgment as to whether the facts justify the use of the drastic power of

injunction necessarily turns on subtle and controversial considerations and upon a delicate assessment of the particular situation in light of legal standards which are inescapably imprecise." Carroll v. Princess Anne, 393 U.S. 175, 183 (1968).

What appellants propose to do, after all, lies at the very heart of the first amendment: they wish to hold a public event to promote socio-political views some may find offensive. They claim that calling their event the Gay Olympic Games is essential to the message they wish to convey. A long and unbroken line of Supreme court cases stands for the proposition that "[a]ny prior restraint on expression come to [court] with a 'heavy presumption' against its constitutional validity." Organization for a Better Austin v.

O'Keefe, 402 U.S. 415, 419 (1971)(citing Carroll, 393 U.S. at 181; Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963)).[6] Under this standard, prior restraints have been struck down even where adopted to protect important public or private interests. See, e.g., New York Times v. United States, 403 U.S. 713 (1971)(national security); Organization for a Better Austin v. O'Keefe, 402 U.S. 415 (1971)(privacy). By contrast, the panel here approves a permanent injunction that significantly blunts rights to public expression without the slightest showing that the enjoined use would harm anyone.

Moreover, "[a]n order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional man-

date and the essential needs of the public order." Carroll, 393 U.S. at 183. I have much difficulty reconciling the blunderbuss injunction entered against SFAA with this admonition. With all due respect, the panel's offhand approval of this injunction, obtained as it was by summary judgment, simply does not measure up to the close appellate scrutiny due first amendment claims and defenses. See Bose Corp. v. Consumers Union of United States, Inc., 104 S.Ct. 1949, 1961-65 (1984); Standard Oil Co. vo California v. FTC, 577 F.2d 653 (9th Cir. 1978).

* * *

In sum, I believe that the petition for rehearing raises very serious arguments that deserve consideration and resolution by the court en banc. The panel fails to acknowledge the

difficult first amendment issues presented, regrettably bypassing what I consider to be clear and applicable guidance from the Supreme Court. The opinion will therefore prove a troublesome precedent, undermining not only the right to free speech, but also the laws protecting intellectual property, to the ultimate detriment of both.

While not every error by a panel can be addressed by the full court, the important and novel constitutional issues raised by this case, the panel's failure to adequately address them and the likely adverse effect the opinion will have on personal liberties, all strongly militate in favor of rehearing the case en banc. I therefore respectfully dissent from the court's refusal to do so.

FOOTNOTES

[1] Trademarks are recognized only upon a showing that the mark has been adopted and use in commerce. 15 U.S.C. §1051 (1982); Blue Bell, Inc. v. Farah Mfg. Co., 508 F.2d 1260, 1265 (5th Cir. 1975). Subsequent users may raise a series of defenses under section 33(b) of the Lanham Act, such as fraud on the Patent and Trademark Office, abandonment, fair use, misrepresentation of source, or violation of the antitrust laws. 15 U.S.C. §1115 (1982). There are also equitable defenses such as estoppel by laches, Anheuser-Busch, Inc. v. Du Bois Brewing Co., 175 F.2d 370, 374 (3rd Cir. 1949), cert. denied, 339 U.S. 934 (1950); estoppel by acquiescence, see National Football league v. Governor of Delaware, 435 F.Supp. 1372 (D.Del.1977); and unclean hands, see Precision instru-

ment Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806 (1945). Most importantly, trademark rights can only exist in distinctive terms and devices. 15 U.S.C. §1052 (1982); see Levi Strauss & Co. v. Blue Bell, Inc., 778 F.2d 1352 (9th Cir.1985)(en banc). Similarly, there cannot be a trademark in a purely functional device. Fotomat Corp. v. Photo Drive-Thru, Inc., 425 F.Supp. 693 (D.N.J.1977); see Kellogg Co. v. National Biscuit Co., 305 U.S. 111, 119-20 (1938). Distinctiveness is central to the status of a mark. A legitimate trademark will lose its status if it becomes generic. Bayer Co. v. United Drug Co., 272 F. 505 (S.D.N.Y.1921)(declaring the term 'aspirin,' originally a trademark, to be the common name of a non-prescription drug). Thus, trademark owners have an exclusive right to use

the mark only to the extent necessary to safeguard the integrity of the product source. J. Gilson, Trademark Protection and Practice, §1.03[5](1985).

[2] Copyrights are of limited duration, U.S. Const., Art. 1, §8; 17 U.S.C. §302 (1982), and are subject to a number of defenses, most notably the defense of fair use. 17 U.S.C. §§107-117 (1982). Copyright protection will not extend to the idea itself, Baker v. Selden, 101 U.S. 99 (1880)(no copyright in accounting system); or to purely utilitarian objects, Mazer v. Stein, 347 U.S. 201 (1954)(allowing copyright of figurative lamp base, although lamp itself was functional).

[3] Patents are granted only for subject matter that is novel, useful and non-obvious. 35 U.S.C. §§101-103 (1982). They are limited in time. U.S. Const.

Art. I, §8; 35 U.S.C. §154 (1982). They are also subject to a variety of legal and equitable defenses, including patent misuse, Sonobond Corp. v. Uthe Technology, Inc., 314 F.Supp. 878 (N.D. Cal. 1970); invalidity, Lang v. VSL Corp., 219 U.S.P.Q. 625, 627 (E.D. Va. 1982); expiration of the statute of limitations, 35 U.S.C. §286 (1982); laches and estoppel, Potter Instrument Co. v. Storage Technology Corp., 641 F.2d 190, 191 (4th Cir.), cert. denied, 454 U.S. 832 (1981); and inequitable conduct before the Patent and Trademark Office, J.P. Stevens Co. v. Lex Tex, Ltd., 747 F.2d 1553 (Fed. Cir. 1984), cert. denied, 106 S.Ct. 73 (1985).

[4] An examination of business listings in metropolitan telephone directories gives some indication of the Amateur Act's sweep. In Los Angeles there

are listings for over 140 businesses whose name starts with the word Olympic, many of them located on Olympic Boulevard. Pacific Bell, White Pages: Los Angeles 773-74 (1985). The Manhattan directory has about 60 listings. New York Telephone, NYNEX White Pages: Manhattan 1142 (1985). The directory for Olympia, Washington, has over 30 listings. Pacific Northwest Bell, White & Yellow Pages: Olympia, Lacey & Tumwater 111 (1985). Among the listings are such diverse businesses as the Olympic Bar B Que Restaurant; Olympic Donuts; the Olympic Married Matching Service; the Olympic Tae Kwon-Do Karate Studio; Olympic Trailer Movers; the Olympic Memorial Funeral Home; Olympic Unpainted Furniture; Olympic Wall Street Services; and the Olympic Headwear Novelty Company. These trade names, and what must be

hundreds more across the country, presumably violate the Amateur Act as interpreted by the court.

[5] As the Court held in Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975), "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use. Our distaste for censorship -- reflecting the natural distaste of a free people -- is deep-written in our law." Accord Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1409 (9th Cir.)(first amendment violation found because of "impermissible risk of covert discrimination based on the content of or the views expressed in the operator's proposed programming"), cert. granted, 106 S.Ct. 380 (1985).

[6] Courts have been particularly vigilant in guarding the first amendment rights of groups espousing unpopular points of view. See, e.g., Carroll v. Princess Anne, 393 U.S. 175 (1968)("white supremacist" National States Rights Party); Collin v. Smith, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978)(Nazis).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORIA

BEFORE: THE HONORABLE J.P. VUKASIN, JUDGE

INTERNATIONAL OLYMPIC COMMITTEE, ETC., AND THE UNITED STATES OLYMPIC COMMITTEE, ETC.,	No. C-82-4183-JPV
PLAINTIFFS AND CROSS-DEFENDANTS.	SAN FRANCISCO, CALIFORNIA
vs.	
SAN FRANCISCO ARTS & ATHLETICS, AND THOMAS P. WADDELL,	
DEFENDANTS AND CROSS-PLAINTIFFS.	

REPORTERS' TRANSCRIPT

THURSDAY, FEBRARY 2, 1984

A P P E A R A N C E S:

FOR PLAINTIFFS: VAUGHN R. WALKER
ROBERT A. GORDON
PILLSBURY, MADISON
& SUTRO
225 BUSH STREET
SAN FRANCISCO,
CALIFORNIA 94120

FOR DEFENDANTS: MARY C. DUNLAP
425 STAPLES AVENUE
SAN FRANCISCO,
CALIFORNIA 94112

Page 52, Line 25 through
Page 55, Line 10:

THE COURT: I don't think that's relevant to the argument. Thank You. The matter is submitted.

I refer to Section 380 of the Amateur Sports Act of 1978.

Falling on that reference it appeared that defendants first argue that the tending to cause confusion standard must be read in the overall prohibition on the use of the term "Olympic" to promote any athletic performance or competition and that this is a question of fact which cannot be determined on a motion for summary judgment.

Secondly, they argue that even if this standard is not read in the use of the term "Gay Games" in connection with "Olympic," is a combination under a

subsection of Section 380 in invoking the allegedly factual "tending to cause confusion" standard.

Regarding first contention that "tending to cause confusion" standard should not be applied to the basic promotion of athletic contests, the dramatical construction and a plain meaning of the statute indicates that this alone is sufficient violation to impose liability.

The reference already made to the opinion of the Ninth Circuit any other interpretation will be deemed "inawkward construction."

Defendants' other claim is also without merit to infer that Gay Olympic Games is a combination requiring the U.S.O.C. to prove "tendency to cause confusion" distorts the Congressional intent that an authorized use of the

term "Olympic" does not require proof of such tendency otherwise obviously the U.S.O.C. would be compelled to present, I would say, such proof whenever an infringer uses the word "Olympic" by any other word.

Defendants contended that their use of the "Olympic" constitutes a quote "fair use" unquote defense under the Trademark Act. This Court's reading of Section 380 indicates that 380 incorporates only the remedies of the Trademark Act and nothing in the language or the legislative history of Section 380 indicates that the Trademark Act's defenses were to be incorporated as well.

Defendants have claimed that the U.S.O.C. is a governmental actor subject to certain constitutional scrutiny. The only case to have dealt with

this question expressly found that that doctrine did not file.

Defendants also have contended as a defense the alleged violation of their First Amendment rights and 14th Amendment rights. These arguments can be disposed of on the grounds that quote "no state action" unquote is present because the U.S.O.C. is not a governmental actor.

The defendants have contended that the proposed injunction permanently prohibiting them from using the term "Olympic" is too broad.

They also contend that they should be allowed to use that word with a suitable disclaimer. I think it's the opinion of this Court that this argument would undermine the purpose of the Amateur Sports Act of 1978 and, in effect, with countenance allowing any

infringer, however objectionable, to use "Olympic," as long as it expressly disallowed any connection with the U.S.O.C.

It appears to the Court that tehre are no triable issues of fact. Summary Judgment shall be granted in favor of the Plaintiffs and a Preliminary Injunction is hereby made permanent.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INTERNATIONAL OLYMPIC COMMITTEE, a corporation organized and existing under the laws of Switzerland; UNITED STATES OLYMPIC COMMITTEE, a corporation organized and existing under the laws of the United States of America	82-4467 D.C.# C-82-4183-RFP
Plaintiffs-Cross-Defendants-Appellees,	MEMORANDUM ORDER GRANTING PLAINTIFFS' MOTION FOR AWARD OF ATTORNEY FEES
vs. SAN FRANCISCO ARTS & ATHLETICS, and Thomas P. Waddell,	
Defendants-Cross-Plaintiffs-	

Filed -- September 21, 1984

Plaintiffs International Olympic Committee (IOC) and United States Olympic Committee (USOC) previously have prevailed in this Court against defendants San Francisco Arts & Athletics and Thomas Waddell in an action under the Amateur Sports Act of 1978 (36 U.S.C. §371, et seq.) to enjoin defendants' infringement of Olympic terminology and symbols. Plaintiffs now move for an award of attorney's fees against defendants. This matter came on regularly for hearing before this Court, the Honorable J.P. Vukasin, Jr., District Judge, presiding. Having considered both the oral and written arguments of counsel and all the pleadings submitted, the Court by this order grants plaintiffs' motion for attorney's fees in the amount of $96,600.00.

Remedies under the Amateur Sports Act are addressed in 36 U.S.C. §380. This section provides that remedies available to parties are those provided under the Lanham Trademark Act of 1946 (15 U.S.C. §1051, et seq.). 36 U.S.C. §380(a). The Lanham Trademark Act addresses attorney's fees in 15 U.S.C. §1117, wherein it provides that the Court may award reasonable attorney's fees to the prevailing party "in exceptional cases."

The parties disagree as to the interpretation of 15 U.S.C. §1117. In enacting the Amateur Sports Act, plaintiffs argue, Congress made reference to 15 U.S.C. §1117 as a shorthand method of referring to the nature of remedies (attorney's fees) available under the Amateur Sports Act. The standard for granting attorney's fees, according to

plaintiffs' interpretation of the legislative history, was intended to be one of complete discretion in the Court. Defendants, however, argue that reference to §1117 must necessarily include the standard developed by cases applying this section to trademark cases. The standard developed by the case law circumscribes the Court's discretion to awarding attorney's fees only in those cases where infringement may be characterized as malicious, fraudulent, deliberate or wilful. Jellibeans, Inc. v. Skating Clubs of Georgia, Inc., 716 F.2d 833, 841 (2nd Cir. 1983); but see United States Olympic Committee v. Intelicense, 737 F.2d 263, 267 (2d Cir. 1984).

Even accepting the latter argument, an award of attorney's fees is doubtless appropriate, given the par-

ticularly egregious actions of defendants. Declarations submitted by defendants themselves evidence that their use of Olympic terminology and symbols was deliberate and wilful. As early as December, 1981, defendants were informed that the USOC and the IOC regarded their use of Olympic terminology as a violation of the Amateur Sports Act. Defendant Waddell agreed at one point to cease use of Olympic terminology and symbols in deference to the USOC's objection. After a change of heart, however, and in spite of being fully advised by counsel that their use of Olympic designations could be held a violation of the Amateur Sports Act, the defendants resumed use of the terminology and symbols in promoting their activities. Their flagrant use of the terminology and symbols continued

uninterruptedly for an extensive period thereafter, and only closed upon the issuance of an injunction by this Court. Defendants apparently felt secure in their misconduct owing to the mistaken belief that, due to the homosexual orientation of their organization, they possessed a valid constitutional defense to prosecution under the Amateur Sports Act.

There is no more appropriate description of defendants' conduct in this case than deliberate and wilful. Not only were defendants' action wilful in that they intended the result of their actions, defendants knowingly, deliberately and wilfully violated the letter of the Amateur Sports Act. The circumstances thus justify the imposition of attorney's fees regardless of which standard argued by the parties is applied.

Defendants further contend that their constitutionally-based defense to the infringement action was plausible and that an award of attorney's fees is therefore appropriate. The standard, however, is not whether the defense was frivolous or not. The wilful or deliberate nature of defendants' actions, not the qualify of the defense, is of concern to the Court. One who violates a statute on the advice of counsel that the statute may be unconstitutional has committed no less a wilful violation because of the desire to precipitate a constitutional "test" case than any other violator. Cf. La Raza of Southern Alameda County v. Volpe, 440 F.Supp. 904 (N.D. Ca. 1977).

An award of attorney's fees in this case also promotes the goals of the Amateur Sports Act. The Act is

intended to develop, foster, and promote amateur athletics in this country. 36 U.S.C. §374. Because the USOC is the only National Olympic Committee that does not receive formal financial assistance from its host governing, financing the United States Olympic Team poses unique obstacles. See United States Olympic Committee v. Intelicense, supra, 737 F.2d at 266. In that case, Judge Irving Kaufman addressed himself to this point in the following words: "The fundamental purpose of [the] Act was to safeguard the USOC's ability to raise the financial resources that are a critical component of America's capacity to send world-class athletes into international competition without the massive government subsidies enjoyed by competitors from other nations." Id., at 264.

Mindful of that important objective, it is readily apparent to the Court that this goal is frustrated when large amounts of funds are diverted to prosecute legal actions against infringers. An award of attorney fees here would replenish the funds channeled away from the promotion of amateur athletics, funds used for the more constructive purpose of implementing the USOC's athletic programs. The public interest is best served by having the costs necessary for enforcement of the Amateur Sports Act borne by those who wilfully and deliberately violate that statute.

Accordingly, for the reasons outlined above, IT IS HEREBY ORDERED that

Plaintiffs' motion for attorney's fees in the amount of $96,600.00 is GRANTED.

DATED: September 21, 1984

J.P. VUKASIN, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF CALIFORNIA

INTERNATIONAL OLYMPIC COMMITTEE, a corporation organized and existing under the laws of Switzerland; UNITED STATES OLYMPIC COMMITTEE, a corporation organized and existing under the laws of the United States of America,	No. C-82-4183 J.P.V.
Plaintiffs,	JUDGMENT
vs.	
SAN FRANCISCO ARTS & ATHLETICS, and Thomas P. Waddell,	
Defendants.	

Filed February 16, 1984

Plaintiffs having moved for summary judgment in their favor and against defendants on the complaint and dismissing defendants' counterclaims, the said motion having on February 2, 1984 come on before the Court, which indicated its intention to grant the motion

and which has entered its order granting the same,

N o w, T h e r e f o r e, it is ORDERED, ADJUDGED and DECREED as follows:

1. Defendants, their employees, agents, officers, attorneys and representatives, all persons participating with or act in concert with them, and each of them, shall immediately cease, desist and refrain from using or causing to be used for the purpose of trade, to induce the sale of any goods or services, or in connection with any advertising, promotion, publicity or production of any theatrical exhibition, athletic performance or competition:

(a) "Olympic" or "Olympiad"; or

(b) any combination or simulation of "Olympic" or "Olympiad" or any

other word, term, name, trademark, trade name, sign, symbol, emblem or insignia tending to cause confusion, or to cause mistake, to deceive or falsely to suggest a connection with the International Olympic Committee, the United States Olympic Committee or any Olympic activity or authorization by the International Olympic Committee or the United States Olympic Committee.

2. Defendants' counterclaims be and the same are dismissed and defendants shall taking nothing by their counterclaims.

3. Plaintiffs shall recover their costs of action.

DATED: February __, 1984

/s/J.P. Vukasin, Jr.
United States District Judge

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INTERNATIONAL OLYMPIC COMMITTEE, a corporation organized and existing under the laws of Switzerland; UNITED STATES OLYMPIC COMMITTEE, a corporation organized and existing under the laws of the United States of America	)	82-4467
	)	D.C.# C-82-4183-RFP
	)	MEMORANDUM
Plaintiffs-Cross-Defendants-Appellees	)	
vs.	)	
SAN FRANCISCO ARTS & ATHLETICS, and Thomas P. Waddell,	)	
Defendants-Cross-Plaintiffs-Appellants.	)	

Argued and Submitted
March 15, 1983

Before HUG and FARRIS, Circuit Judges, and GADBOIS, District Judge.*

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* Hon. Richard A. Gadbois, United States District Judge for the Central District of California, sitting by designation.

This appeal is from a preliminary injunction enjoining appellants, pursuant to 36 U.S.C. §380, from using the word "Olympic" "for the purposes of trade, to induce the sale of any goods or services, or in connection with any advertising, promotion, publicity or production of any theatrical exhibition, athletic performance, competition or event." We affirm the district court.

Our review of an order granting or denying a preliminary injunction is limited. Such an order will be reversed only if the district court "relied on an erroneous legal premise or abused its discretion." Sports Form, Inc. v. United Press Int'l, Inc., 686 F.2d 750, 752 (9th Cir. 1982).

The district court applied the correct standard for determining wheth-

er a preliminary injunction should issue. See Benda v. Grand Lodge of the Int'l Ass'n of Machinists & Aerospace Workers, 584 F.2d 308, 314-15 (9th Cir. 1978), cert. dismissed, 441 U.S. 937 (1979).

Appellants contend that the district court erred in finding that appellees had demonstrated a sufficient probability of proving that appellants' use of the word "Olympic" would tend to cause confusion. The district court based its finding on the similarities between appellants' games, known as the "Gay Games," and the official Olympic games. The Gay Games are apparently modeled on the official Olympic games. Ten of the seventeen events in the Gay Games are official Olympic events. The Gay Games include such ceremonial events as the carrying of a torch, an

opening parade, and the closing ceremonies. Participants march behind the flags and the cities and countries they represent at opening and closing ceremonies. Appellants argue that the purpose and character of the Gay Games is completely different from that of the official Olympics. They contend a primary purpose of the Gay Games is to create a more realistic public image of homosexuals. In addition, the organizers of the Gay Games contend they stress self-fulfillment, rather than winning, and seek to minimize nationalism. On this record, it was not an abuse of discretion for the district court to find that appellants had demonstrated a sufficient likelihood of success on the merits. The differences between the Gay Games and the official Olympics are not such that they compel

the conclusion that appellees probably will not be able to prove a tendency to confuse.[1]

Appellants also argue that the district court improperly employed a "presumption of unlawfulness" against their use of the word "Olympic." We do not read the district court's use of the "presumption" as indicating that a legal presumption was applied. Read in context, it is clear that the district court's conclusion was based on the record before it without the aid of a legal presumption.

Appellants' first amendment arguments also do not warrant reversal. The injunction accords with the provisions of 36 U.S.C. §380 and is not overbroad. Appellants are not enjoined from making factually correct statements which mention the Olympic games. There is no

first amendment right to use the word "Olympic" in the title of appellants' games so long as there are other adequate means by which appellants can communicate their message. See Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972); Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 206 (2nd Cir. 1979).

For the reasons set forth in the district court's opinion, appellants' remaining arguments, including their discrimination argument, are not grounds for reversing the district court.

The district court's order granting the preliminary injunction is AFFIRMED.

FOOTNOTE

1 PAGE 3

By affirming the district court on this issue, we do not mean to imply that it is necessary in this case to prove a tendency to confuse. The grammatical construction and legislative history of 36 U.S.C. 380 raise the possibility that when the word "Olympic" is used "for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition," as may have been done in this case, it is not necessary to show that it "tend[ed] to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the [USOC] or any Olympic activity." The "tending to cause confusion" requirement may apply only to combinations or

simulations of the words "Olympic," "Olympiad," or "Citius Altius Fortius," and not to the use of those precise words.

> Sections 380's predecessor, 36 U.S.C. [former] §379, imposed criminal penalties for the unauthorized use of the words "Olympic," "Olympiad," or "Citius Altius Fortius," for commercial, theatrical, athletic, or competitive purposes. There was no requirement of tending to cause confusion, mistake, or deception.

The changes in the law made by section 380 were explained in a letter from the Commissioner of Patents and Trademarks which was made a part of the House Report on that legislation. That letter indicates that section 380 was intended to carry forward the prior

law's prohibition on the use of the words "Olympic," "Olympiad," and "Citius Altius Fortius," and to add to this list combinations and simulations tending to cause confusion, mistake, or deception. H.R. Rep. No. 1627, 95th Cong., 2nd Sess. 37, 38, reprinted in 1978 U.S. Code Cong. & Ad. News 7478, 7495, 7496. The Commissioner's letter also states:

> Section [380 (a)(4)] makes actionable not only use of the words "Olympic," "Olympiad," "Citius Altius Fortius," and any combination thereof, but also any simulation . . . thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the [USOC] or any Olympic activity.

Id. at 38, 1978 U.S. Code Cong. & Ad. News at 7496.

The grammar of section 380 also raises the possibility that it is not

necessary to show a tendency to confuse in connection with the use of the word "Olympic." It would be an awkward construction if the phrase "tending to cause confusion" was intended to modify the words "Olympic," "Olympiad," and "Citius Altius Fortius."

We need not reach this question of statutory interpretation, however, since the district court assumed that it was necessary to show a tendency to confuse and the parties have not raised the issue on this appeal. If it was not necessary to show a tendency to confuse, appellees' case for a preliminary injunction would have been even stronger. We point out this issue only so that the parties will have an opportunity, if they so choose, to more fully explore it before the district court issues its final judgment.

APPENDIX H'

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INTERNATIONAL OLYMPIC COMMITTEE, a corporation organized and existing under the laws of Switzerland; UNITED STATES OLYMPIC COMMITTEE, a corporation organized and existing under the laws of the United States of America,	)	No. C-82 4183 RFP
Plaintiffs,	)	O R D E R
vs.	)	
SAN FRANCISCO ARTS & ATHLETICS, a California corporation; THOMAS F. WADDELL,	)	
Defendants.	)	

Filed August 20, 1982

Plaintiffs International Olympic Committee and United States Olympic Committee seek to enjoin defendants from using the word "Olympic" in connection with the organization and conducting of athletic competitions or

performances scheduled to commence in San Francisco on August 28, 1982. Plaintiffs seek relief under the International Convention for the Protection of Intellectual property and for unfair competition (15 U.S.C. §1126(h)), for violation of the Amateur Sports Act of 1978 (36 U.S.C. 371 et seq.), for federal trademark infringement (15 U.S.C. §1114), for false designation of origin, false description or representation (15 U.S.C. §1125(a)), for breach of contact between the parties, and for dilution of plaintiffs' distinctive marks (California Business & Professions Code §14330). Jurisdiction of this court arises under 28 U.S.C. §1331, 1337, and 1338.

Plaintiff International Olympic Committee (IOC) is a nonprofit organization created by Congress of Paris of

June 23, 1894, and organized and existing under the laws of Switzerland. IOC's principal place of business is Lausanne, Switzerland. Plaintiff United States Olympic Committee (USOC) is a private, nonprofit corporation duly chartered and existing under the laws of the United States of America (36 U.S.C. §§371-396),[2] having its principal place of business at Colorado Springs, Colorado. USOC does business in California and elsewhere in interstate commerce.

Defendant San Francisco Arts & Athletics (SFAA) is a corporation

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[2] The USOC was first incorporated and granted a federal charter in 1950. Pub.L. No. 81-805, 64 Stat. 899. However, predecessors to the now federally-chartered USOC have existed since 1896. DeFrantz v. United States Olympic Committee, 492 F.Supp. 1181 (D.D.C. 1980).

organized and existing under the laws of California, having its principal place of business in California and elsewhere in interstate and foreign commerce. Defendant Thomas F. Waddell, M.D., is a resident of the City and County of San Francisco. Waddell is currently on leave from his job as Medical Director of Whittaker Corporation of Los Angeles so that he may serve as a non-salaried President of SFAA and Chairman of the Gay "Olympic" Games.

The court finds that the relevant facts surrounding the current motion are as follows. SFAA filed papers of incorporation with the State of California approximately one year ago. The nonprofit organization attempted to incorporate under the name "Golden Gate Olympic Association." The California

Department of Corporations informed them that the word "Olympic" could not be used in a corporate title. Hence, on November 4, 1981, it filed for incorporation as San Francisco Arts & Athletics.

Defendants were under the impression that, despite the fact that "olympic" could not be part of their corporate title, they could nevertheless use the word to describe the series of athletic games they intended to sponsor from August 28 to September 5, 1982. As early as September 1981, defendant Waddell received word indirectly that the USOC had become aware of the Gay "Olympics" and were troubled by the potential trademark infringement. Waddell was advised to write to the USOC seeking permission to use the word "olympic" in connection with the upcom-

ing Gay Games. Waddell says he was informed that this request was a mere formality. The letter was mailed to F. Don Miller, Executive Director of USOC, on December 26, 1981.

Apparently unknown to Waddell, Miller had sent a letter addressed to the "Gay Olympic Games" on December 23. At that time, Miller brought to the attention of Waddell the existence of the Amateur Sports Act of 1978 (Pub. L. 95-606; 36 U.S.C. §380) and asked the Gay "Olympics" to terminate immediately its use of the word "olympic." This position was reiterated on January 6, 1982, in a responsive letter to Waddell's request of December 26.

Waddell apparently did not immediately receive the January 6 letter from Miller. On January 15, 1982, he called Miller and asked for a response to his

request. Miller explained the USOC's position and once again demanded termination of the use of the word "olympic."

On January 18, 1982, Waddell wrote to Miller and agreed to drop the word "olympic" from the Gay Games. The relevant portion of the letter read:

> As per your request and according to the letter of Public Law 95-606-Nov. 8, 1978, we have discontinued the use of the term "Olympic" to describe our event.
>
> We have, as an interim measure, blocked out the term "Olympic" and in all subsequent printed materials will substitute the term "Athletic."

Waddell now claims the letter was meant only to indicate the SFAA would cease use of the term "olympic" as an interim compromise, pending negotiations over use of the word. We believe, to the contrary, that the letter agreed

to cease permanently the use of "Olympic" and that the "interim measure" mentioned in the letter referred to the fact that defendants would block out "olympic" from their old stationery and posters until such time as new printed materials could be obtained.

Miller responded to Waddell's letter of January 18 nine days later. He acknowledged receipt of Waddell's letter and indicated appreciation that the Gay "Olympic" Games would henceforth be the Gay "Athletic" Games. Waddell, however, had recently been conferring with legal counsel who informed him that they believed the USOC was acting in a discriminatory and unconstitutional manner. Consequently, Waddell wrote a lengthy letter to Miller on January 26 renewing his original request for permission to use

the word "olympic." Waddell implied that denial of his request might cause the SFAA to seek declaratory relief in the courts.

Miller never personally responded to this last correspondence. Instead, Richard Kline, legal counsel for the USOC, wrote to Waddell on February 2. Kline said that the USOC and SFAA had reached a binding agreement in their previous exchange of letters (specifically, USOC's letter of December 12, 1981, and Waddell's letter of January 18, 1982) as evidenced by the USOC's response of January 27, 1982. In conclusion, Kline insisted that the SFAA "adhere to this agreement" and refrain from use of the word "olympic" in its upcoming Games.

Waddell claims that on February 2, he conferred with the Northern Calif-

ornia chapter of the American Civil Liberties Union (ACLU) concerning this subject and was advised (1) not to take legal action against the USOC, but (2) if the SFAA was sued by the USOC, the ACLU would defend it. Waddell says he then decided to resume the use of the word "olympic," "in the firm belief that we had as much right to use the term as other organizations who had used it without permission from the USOC." (Waddell Declaration at p. 7.)

The USOC claims it received no indication subsequent to its letter of February 2 that the SFAA planned to resume use of the word and that it therefore took no action. Defendants asserts that Waddell's letter of January 26 informed the USOC that they intended to put on the Gay "Olympic" Games rather than the Gay "Athletic"

Games. Due to the fact that a number of letters were sent between plaintiffs and defendants during this period, many of them crossing paths "like ships in the night," the court finds it likely that each party was under the impression that it had forced its wishes upon the other party and that each had achieved its respective goals.

According to plaintiffs, the first notice they had that the SFAA had resumed use of the term "Gay Olympics" was an article which appeared in the San Francisco Examiner & Chronicle on Sunday, May 23, 1982, entitled "A very serious Gay Olympics." Miller reacted to the article by having his staff investigate and, after confirming SFAA's resumption of the word "Olympic," raised the issue with the IOC in London and with the USOC's Administra-

tive Committee. On August 9, plaintiffs filed the present lawsuit and sought a temporary restraining order to prevent defendants from using "olympic" in connection with the Gay "Olympic" Games. Due to this court's unavailability, the motion was heard before the Honorable Samuel Conti on August 9. Judge Conti, focusing especially on the plaintiff's "probable success on the merits," granted the restraining order.

The matter is now before this court on plaintiff's motion for a preliminary injunction. Oral argument was heard on August 19, 1982, with all parties represented by counsel. Based upon this evidentiary record, the parties' moving papers and supporting affidavits, and arguments of counsel, the court issues the findings of fact and conclusions of law contained in this order. Fed. R. Civ. P. 52(a).

Until four years ago, the section of the USOC's federal charter governing unauthorized use of words and symbols associated with the Olympic Games was 36 U.S.C. [former] §379, which provided criminal penalties for such misuse. The charter did not concern itself with trademark protection as such, except insofar as criminal penalties provided a disincentive to trademark infringement. In 1978, Congress repealed the criminal penalties and passed a new Amateur Sports Act of 1978, 36 U.S.C. §380, which the President signed into law on November 8 of that year. The new act expressly provided for a civil action under the Trademark [Lanham] Act of 1946, 15 U.S.C. §1051 et seq.

> Without the consent of the Corporation [USOC], any person who sues for the purpose of trade, to induce the sale of any goods or

> services, or to promote any theatrical exhibition, athletic performance, or competition--
>
> (1) ...
>
> (2) ...
>
> (3) ...
>
> (4) the words "Olympic," "Olympiad," "Citius Altius Fortius," or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity;
>
> shall be subject to suit in a civil action by the Corporation for the remedies provided in the Act of July 5, 1946 (60Stat. 427; popularly known as the Trademark Act of 1946).

This subsection also contains a grandfather clause permitting continued use of any similar words and symbols used lawfully before September 21, 1950, and subsection (b) permits the USOC to license the protected words and symbols. Subsection (c) provides that:

> The Corporation shall have exclusive right to use the name "United States Olympic Committee"; ... and the words "Olympic," "Olympiad," "Citius Altius Fortius" or any combination thereof subject to the pre-existing rights described in subsection (a) of this section.

Plaintiffs argue that subsection (a) of the statute makes actionable any use in trade of the word "Olympic" whether or not such sue would be actionable on a trademark or unfair competition theory. Further, they note that subsection (c) provides that the USOC shall have the exclusive right to use "Olympic." Thus, plaintiffs argue, any unauthorized use of "Olympic" would be unlawful. By reserving the exclusive use of "Olympic" to the USOC, the Amateur Sports Act forecloses the possibility of any other party obtaining any protectable rights in "Olympic."

Because the Amateur Sports Act has only recently been amended and provided with civil remedies, relatively little case law interpreting the statute can be found. Defendants argue that this court should be guided by the opinion in Stop The Olympic Prison v. United States Olympic Committee, 489 F.Supp. 1112 (S.D.N.Y. 1980) [hereinafter "S.T.O.P."]. The S.T.O.P. case involved a nonprofit public interest group concerned with prison reform and organized to increase public awareness of and generate opposition to the construction of a federal prison that would also be used to house athletes participating in the 1980 Lake Placid Winter Olympic Games. To further its protest activities, S.T.O.P. designed and distributed a poster with the legend "STOP THE OLYMPIC PRISON" which displayed the Olympic rings and torch.

The court in S.T.O.P. agreed that, in awarding the USOC the exclusive right to use the word "Olympic" and the Olympic symbols, Congress had used broad wording. Nevertheless, the court held, "subsection (c)...cannot be interpreted to mean that only the defendant and its licensees may use the word "Olympic" and the enumerated symbols for any purpose whatsoever." Id. at 1119.

The S.T.O.P. court felt compelled, accordingly, to analyze the statute to determine "the range of uses to which the USOC may properly claim exclusive right under section 380." Id. Judge Cannella concluded that Congress' objective in passing the Amateur Sports Act was "to establish strong protection for the Olympic symbols, in part to ensure the market value of licenses for

their use." Id. at 1120. With this objective in mind, he held that S.T.O.P.'s poster violated neither subsection (a) nor subsection (c) of section 380. The S.T.O.P. poster, he explained, was not used "for the purposes of trade," or "to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition." Id., quoting section 380.

To the extent that Judge Cannella concluded that section 380 does not establish a per se rule against the unauthorized use of the word "Olympic" and the Olympic symbols, this court agrees with his opinion. We must proceed to analyze defendants' acts and actions to determine whether they fall within the "range of uses" to which the USOC may properly claim exclusive rights under the Amateur Sports Act.

Factually, though, the S.T.O.P. opinion differs significantly from the instant case. As noted above, the S.T.O.P. organization was a public interest group concerned with prison reform. it was only coincidentally connected with the Olympic Games. S.T.O.P. was not seeking to promote any theatrical exhibition, athletic performance, or competition by its use of the word "Olympic" and the Olympic symbols in its poster.

On the other hand, defendant SFAA is organizing a series of athletic events of an international scope[3] modeled on the original Olympic Games. Although the Gay Games are to include

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[3] To date, representatives from at least eleven other countries are to participate in the Gay Games. (Brown Declaration at p. 2.)

seven sporting events which are not in the Olympic Games because they are popular as organized sports in gay communities,[4] the Gay Games also are to include at least ten sporting events which are in the Olympic Games.[5]

In addition, the Gay Games, although sponsored by the gay community, are open to both homosexuals and heterosexuals. Moreover, the long range goal of the sponsors is apparently to sever the Games from their direct connection with the gay community altogether.

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[4] Billiards, bowling, softball, golf, powerlifting, physique, and rugby.

[5] Basketball, volleyball, boxing, cycling, wrestling, track and field, marathon, swimming and diving, soccer, and tennis [added as an exhibition event in the 1984 Games, thereafter to be an official event].

> The inventor, architect and all-year worker for the Gay Olympics is a medical doctor, Tom Waddell, who finished sixth in the 1968 Olympic Games decathlon, in Mexico City. And here's the shocker (to some). If he had his way, he'd remove the word "Gay" from this competition and the entire community or movement.
>
> I don't like labels," he explained. "A great many of us want gay returned to its dictionary meaning -- keenly alive and exuberant, having high spirits, being happily excited. But it is difficult to change an impression of the Gay Olympics. I'd like to change it to People's Olympics. Please believe that it will be an athletic competition and a means of self-fulfillment for everyday people doing everyday things.

"A Victory For the Gay Olympics," San Francisco Chronicle, Thursday, July 29, 1982, p.43.

Further, defendants' plans include Olympic ceremonial events, including the carrying of a torch, an opening

parade, and closing ceremonies. Participants will represent their countries or cities and march behind the flags of these at the opening and closing ceremonies.

Finally, defendants attempt to distinguish the philosophy of the Gay Games as opposed to the Olympic Games. Foremost, of course, is the laudable goal of "creating a more realistic image of homosexual men and women in all societies" and to "provid[e] more alternatives for homosexual men and women to move into the mainstreams of their respective societies." (Waddell Declaration at p.8.) Defendants also assert, however, that their philosophy attempts to create a different climate of competition than in the Olympic Games.

> We want to stress self-fulfillment rather than winning; we want to exploit the potential for combining physical fitness and achievement through competition without making winning the most important element.
>
> We also want to minimize nationalism, so we used cities as the smallest common denominator. To minimize ageism we have made some events "age-group" competitions. To minimize sexism we have mixed the genders in some sports (relays in swimming and track and field, for example, are mixed).

Waddell Declaration at p.8.

As plaintiffs noted at oral argument, though, this stated philosophy is not antithetical to the Olympic philosophy as set forth in the Olympic Creed:

> The most important thing in the Olympic Games is not to win but to take part, just as the most important thing in life is not the triumph but the struggle. The essential thing is not to have conquered but to have fought well.

These similarities between the Gay Olympics and the Olympics sufficiently distinguish the instant case from S.T.O.P. Moreover, they make out a prima facie case of violation of the Amateur Sports Act. Section 380(a)(4) makes actionable any use of the word "Olympic" or similar terms "tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the [USOC] or any Olympic activity." By its choice of the word "tending" rather than "likely," Congress must have meant to place less of a burden on a plaintiff under a section 380 cause of action than that placed upon a plaintiff suing under the Trademark Act alone. We hold that under the circumstances of this case, the court may presume that defendants' actions tend to cause confusion and mistake and

tend to suggest falsely a connection between their athletic games and those of the USOC. We express no opinion whether such a presumption would be permitted to aid plaintiffs were the Gay Games not of a national and international scope, or were the participants limited to a special group or groups, or were the Gay Games not modeled so closely in both events and ceremonies to the Olympic Games. Because the analysis must necessarily be heavily factually oriented, the decision must be made on a case by case basis.

Plaintiffs have demonstrated, therefore, their probable success on the merits of their cause of action under the Amateur Sports Act. Accordingly, it is unnecessary for us to consider plaintiffs' other six causes of action.

In the Ninth Circuit, however, probable success on the merits, without more, is not a sufficient group for the issuance of a preliminary injunction. The moving party may meet its burden by demonstrating either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in its favor. These are not separate tests, but the outer reaches "of a single continuum." Los Angeles Memorial Coliseum Com'n v. National Football League, 634 F.2d 1197 (9th Cir. 1980), quoting Benda v. Grand Lodge of International Ass'n of Machinists & Aerospace Workers, 584 F.2d 308, 315 (9th Cir. 1978). Having determined that plaintiffs have met the probable success standard, we must consider the issue of irreparable injury.

Courts have uniformly recognized that irreparable injury attends trademark infringement. See Visa International v. Bankcard Holders of America, 211 U.S.P.Q. 28, 38 (N.D.Cal. 1981). Once plaintiffs have made out a prima facie case of infringement under the Trademark Act, they are ordinarily aided with a presumption of irreparable injury.

> [A] detailed showing of the danger of irreparable harm is not required in a copyright infringement action where the copyright holder establishes a prima facie case of infringement. [citations] Furthermore, in the usual copyright infringement case a presumption may be raised that irreparable harm will befall the copyright holder upon the infringement of its exclusive use of the copyrighted matter. [citations] Similarly, the infringements of one's trademark usually in and of itself gives raise to the distinct possibility of irreparable injury. [cita-

> tions] When a trademark is infringed, the owner's business reputation and good will are placed in jeopardy due to his inability to exercise any control over the nature and quality of goods being sold or advertised under the infringing trademark. [citations] In addition, it is usually difficult, it not impossible, for the trademark owner to must sufficient proof of the precise measure of its damages or to show how much of any provable injury can be solely attributed to the infringement.

Miller Brewing Co. v. Carling O'Keefe Breweries, 452 F.Supp. 429, 437-38 (W.D.N.Y. 1978).

Loss of business is not the test of irreparable injury in a motion for preliminary injunction against the use of a trademark. The fact that plaintiffs have had the symbol of their reputation placed in the hands of another is irreparable injury. "The injury is to plaintiff's interest in

having exclusive control over the symbol of its own reputation.... The irreparable harm is the damage which will be done to plaintiff's mark itself." Visa International, supra, quoting Louis Rich, Inc. v. Horace W. Longacre, Inc., 423 F.Supp. 1327 (E.D. Pa. 1976).

As noted above, Congress has provided that the USOC may sue for infringement of their "Olympic" mark and symbols for the remedies provided in the Trademark Act of 1946. Having made out a prima facie case herein, the USOC is entitled to the same presumption of irreparable harm afforded other trademark holders who have made out a prima facie case. Accordingly, plaintiffs have satisfied the requirements for the issuance of a preliminary injunction.

Defendants have alleged that the prosecution of this lawsuit by the international and national Olympic committees violates certain rights guaranteed to defendants under the first and fourteenth amendments to the United States Constitution. Defendants argue impassionedly that, since the main objective of Congress in passing section 380 was to ensure the market value of licenses for the use of the Olympic symbols, S.T.O.P., 489 F.Supp. at 1120, to issue an injunction in the instant case would exceed the parameters of the legislation. Defendants argue that the goals of their nonprofit organization are educational, political, and cultural, not commercial, and that therefore an injunction would constitute prior restraint. Moreover, they argue, in issuing the temporary

restraining order in this case, Judge Conti incorrectly adopted plaintiffs' overbroad interpretation of section 380.

The court has serious doubts whether plaintiffs' actions in this case constitute "governmental action," i.e., state action for purposes of invoking the protections of the fourteenth amendment. See DeFrantz v. United States Olympic Committee, 492 F.Supp. 1181 (S.D.N.Y. 1980)(decision of USOC not to participate in 1980 summer Olympic in Moscow held not state action). But see Shelly v. Kraemer, 334 U.S. 1 (1947)(judicial enforcement by state courts of restrictive covenants held to violate fourteenth amendment).

We need not reach that issue, however, because it is unlikely that defendants will be able to show an

abridgment of their freedom of speech in this case. Defendants' argument can be more precisely red as a challenge to section 380 on the ground that it is unconstitutionally overbroad. We have already explained, however, that section 380 does not establish a per se rule against the use of Olympic words and symbols, but only grants the USOC their exclusive use within "a range of uses." Our analysis above has shown how the athletic events defendants seek to put on clearly fall within the ambit of section 380. Accordingly, defendants' argument of unconstitutionality does not detract from our previous assessment of plaintiffs' probably success on the merits.

Defendants argue that, assuming section 380 to be constitutional, plaintiffs' selections of these defen-

dants as a "litigative target" represents discrimination against homosexuals, given that the USOC has not sought to enjoin other possible infringements such as the Police Olympics and the Armenian Olympics.

Homosexuals have indeed been the victims of discrimination and bigotry in other contexts. It does not follow, though, that they have been singled out for discriminatory enforcement of the Amateur Sports Act in this case. Their presence as defendants herein is easily explained by other factors. (1) Since the USOC has had available to it for less than four years civil remedies to enforce its exclusive use rights, it is understandable that there would not be a great number of previous actions. (2) Unlike most other events which use the word "Olympic" to promote a particular

event, the Gay "Olympic" Games are closely modeled on the Olympic Games in scope, content, ceremony, and philosophy. It therefore presents a greater infringement of plaintiffs' exclusive use rights than many other events cited by defendants.[6] (3) Finally, it is not true that the USOC has not prosecuted other civil actions under section 380. The court is aware of at lest four other section 380 suits brought by the

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[6] Plaintiffs have explained to the court that the "Special Olympics," "Junior Olympics," and "Explorer Olympics" are all either specially authorized by Congress to use the word "Olympic" or were grandfathered pursuant to section 380(a).

USOC in the last few years,[7] two of which appear to be against other non-profit organizations. Moreover, plaintiffs have indicated to the court at oral argument that a number of other potential lawsuits are in the pre-litigation negotiation stage. Such negotiations were attempted in the instant case without success.

Accordingly, since the plaintiffs have demonstrated probably success on the merits and irreparable injury, they are entitled to a preliminary injunction.

[7] See USOC v. Golden Age Olympics, Inc., Trademark Trial and Appeal board of the U.S. Patent and Trademark Office, Opposition No. 62, 425 (June 1981); USOC v. Olympic Trials Bus Company, Inc., C-80-2062 (D.C.Cir. 1980)(consent judgment and permanent injunction); National Amateur Sports Foundation v. USOC, C-80-496 (D.C.Cir. 1980)(consent decree); USOC v. David Shoe Company, Inc., C-82-596 (S.D.Ohio 1981)(permanent injunction issued).

It is hereby ORDERED that defendants, their employees, agents, officers, attorney and representatives, all persons participating with or acting in concert with them, and each of them, shall immediately cease, desist and refrain from further use of "Olympic" or "Olympiad" or any confusingly similar word, term, name, trade name or any symbol, emblem, trademark or ensignia of the International Olympic Committee or the United States Olympic Committee, or any combinations or simulations thereof, for the purpose of trade, to induce the sale of any goods or services, or in connection with any advertising, promotion, publicity or production

of any theatrical exhibition, athletic performance, competition or event pursuant to 36 U.S.C. §380.

SO ORDERED.

Dated: August 20, 1982

/s/ Robert F. Peckham
Chief United States District Judge

Supreme Court, U.S.
FILED
SEP 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-270

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SAN FRANCISCO ARTS & ATHLETICS, INC. and DR. THOMAS F. WADDELL,
Petitioners,

v.

UNITED STATES OLYMPIC COMMITTEE and INTERNATIONAL OLYMPIC COMMITTEE,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For the Ninth Circuit

RESPONDENT UNITED STATES OLYMPIC COMMITTEE'S BRIEF IN OPPOSITION

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STATEMENT OF PARTIES

Respondent United States Olympic Committee (hereinafter "U.S. Olympic Committee") is a non-profit, federally chartered and privately financed corporation which is recognized by the Respondent International Olympic Committee as the organization representing the United States in all matters pertaining to the Olympics. Pursuant to the Amateur Sports Act of 1978, the U.S. Olympic Committee exercises exclusive control over commercial and other defined uses of Olympic-related designations, including uses in connection with international athletic competitions, to enable it to meet its responsibility for financing the participation of the United States in the Olympic movement. See 36 U.S.C. §§ 374(3), 375(a)(3), 380.

Petitioner, Dr. Thomas F. Waddell, is a former Olympic participant who was a founder of Petitioner San Francisco Arts & Athletics, Inc. (hereinafter "SFAA"), which is, like the U.S. Olympic Committee, a non-profit corporation which conducts international athletic competitions, as well as other cultural exhibitions.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-270

SAN FRANCISCO ARTS & ATHELETICS, INC., and DR. THOMAS F. WADDELL,

Petitioners,

v.

UNITED STATES OLYMPIC COMMITTEE and INTERNATIONAL OLYMPIC COMMITTEE,

Respondents.

On Petition For a Writ of Certiorari to The United States Court of Appeals For the Ninth Circuit

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RESPONDENT UNITED STATES OLYMPIC COMMITTEE'S BRIEF IN OPPOSITION

The respondent United States Olympic Committee respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Ninth Circuit's decision in this case, reported at 781 F.2d 733 (9th Cir. 1986).

Respondent has no disagreement with the Petition's citation of the decisions below, the statement of grounds for jurisdiction of this Court or the statute involved, with the exception that § 110 of the Ama-

teur Sports Act of 1978 (36 U.S.C. § 380) was not completely set forth in the Petition. Therefore, § 380 is fully reproduced below.

TITLE 36, UNITED STATES CODE

§ 380. Use of Olympic symbols, emblems, trademarks and names

(a) Without the consent of the Corporation [United States Olympic Committee] any person who uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition—

(1) the symbol of the International Olympic Committee, consisting of 5 interlocking rings;

(2) the emblem of the Corporation, consisting of an escutcheon having a blue chief and vertically extending red and white bars on the base with 5 interlocking rings displayed on the chief;

(3) any trademark, trade name, sign, symbol, or insignia falsely representing association with, or authorization by, the International Olympic Committee or the Corporation; or

(4) the words "Olympic", "Olympiad", "Citius Altius Fortius", or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity;

shall be subject to suit in a civil action by the Corporation for the remedies provided in the Act of July 5, 1946 (60 Stat. 427; popularly known as the Trademark Act of 1946). However, any person who actually used the emblem in subsection (a)(2) of this section,

or the words, or any combination thereof, in subsection (a)(4) of this section for any lawful purpose prior to September 21, 1950, shall not be prohibited by this section from continuing such lawful use for the same purpose and for the same goods or services. In addition, any person who actually used, or whose assignor actually used, any other trademark, trade name, sign, symbol, or insignia described in subsection (a)(3) and (4) of this section for any lawful purpose prior to enactment of this chapter shall not be prohibited by this section from continuing such lawful use for the same purpose and for the same goods or services.

(b) The Corporation may authorize contributors and suppliers of goods or services to use the trade name of the Corporation as well as any trademark, symbol, insignia, or emblem of the International Olympic Committee or of the Corporation in advertising that the contributions, goods, or services were donated, supplied, or furnished to or for the use of, approved, selected, or used by the Corporation or United States Olympic or Pan-American team or team members.

(c) The Corporation shall have exclusive right to use the name "United States Olympic Committee"; the symbol described in subsection (a)(1) of this section; the emblem described in subsection (2)(2) of this section; and the words "Olympic", "Olympiad", "Citius Altius Fortius" or any combination thereof subject to the preexisting rights described in subsection (a) of this section.

COUNTER STATEMENT OF THE CASE

The essential facts of the dispute between the parties were fully and accurately summarized by the dis-

trict court in ruling on the U.S. Olympic Committee's motion for preliminary injunction. (Petition Appendix H, A91-A127).[1]

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Courts Have Uniformly Held That § 380 Creates an Independent Cause of Action Which is Well Within Constitutional Constraints.

The Petition is fundamentally flawed. It is premised on a mischaracterization of the interpretation of 36 U.S.C. § 380 by a unanimous panel of the Ninth Circuit Court of Appeals, and other federal courts. Contrary to the uniform treatment given § 380 by courts throughout the land, Petitioners seek artificially to force the rights provided by § 380 into the framework of a traditional "trademark" and then attack those rights because they fail to fit that framework. Section 380 does not duplicate the trademark laws; it stands on its own.

Petitioners have not and cannot assert that there is any conflict between the Circuit Courts of Appeals. Every court to consider § 380 has treated it the same. Indeed, the Second Circuit Court of Appeals noted the consistent interpretation by "*each court to have passed on the intent of § 380,*" holding:

> It is clear that the Congressional intent in enacting § 380 was to promote the United States Olympic effort by entrusting the [U.S.

[1] The Petitioners mistakenly captioned the opinion of the District Court as an opinion of the Court of Appeals for the Ninth Circuit. The opinion was written by Chief Judge Robert F. Peckham, Northern District of California.

> Olympic Committee] with unfettered control over the commercial use of Olympic-related designations. This would facilitate the [U.S. Olympic Committee's] ability to raise those financial resources from the private sector that are needed to fund the United States Olympic Movement.

United States Olympic Committee v. Intelicense Corporation, S.A. 737 F.2d 263, 266 (2d Cir.), *cert. den.*, 105 S.Ct. 387 (1984).

For more than 35 years, the word "Olympic" and other Olympic-related designations have been subject to continuing protection under special provisions contained in the U.S. Olympic Committee's federal charter.[2] The 1950 statute made it unlawful for any person to use the word "Olympic" and certain other Olympic-related designations for limited purposes.[3] This former statute, which was repealed in favor of

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[2] *See*, 36 U.S.C. § 379 (1976) (repealed); 36 U.S.C. § 380 (1981). The U.S. Code also contains many sections providing special civil and criminal protection for designations used by both private and public organizations. *See, e.g.*, the civil protection provided in: 36 U.S.C. § 27 ("Boy Scouts of America"); 36 U.S.C. § 90h ("Disabled American Veterans"); 36 U.S.C. § 1086 ("Little League Baseball); and the following criminal provisions: 18 U.S.C. § 706 ("Red Cross"); 18 U.S.C. § 711 ("Smokey Bear"); 18 U.S.C. § 707 ("4-H Club"); 18 U.S.C. § 704 (military medals or designations).

[3] Those defined purposes were: "for the purpose of trade, theatrical exhibition, athletic performance, and competition or as an advertisement to induce the sale of any article whatsoever or attendance at any theatrical exhibition, athletic performance, and competition or for any business or charitable purpose. . . ." See, 36 U.S.C. § 379 (1976), 64 Stat. 901.

§ 380, imposed criminal penalties that did not require proof of any elements of the trademark laws.

In 1978, as part of a comprehensive redrafting of the U.S. Olympic Committee's charter, these criminal provisions were replaced by civil provisions which carried forward the prohibition against a limited range of uses of "Olympic."[4] "The Amateur Sports Act of 1978, P.L. 95-606, 92 Stat. 3045, created a *new*, independent cause of action, by which the U.S. Olympic Committee could protect the distinctiveness, value and marketability of its various Olympic designations." *U.S. Olympic Committee v. International Federation of Bodybuilders*, 219 U.S.P.Q. 352, 360 (D.D.C. 1982) (emphasis added). *See generally*, 2 J. McCarthy, Trademarks and Unfair Competition, (2d Ed. 1984) § 25:19 pp. 278-279.

This new cause of action provides protection for Olympic-related designations apart from the protection provided by the Federal Trademark Act.[5] Although portions of § 380 were patterned after the Federal Trademark Act,[6] there are fundamental dif-

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[4] The legislative history of § 380 is more fully set forth in the opinion below, 781 F.2d at 735, Petition at A3.

[5] In addition to asserting a § 380 claim, the complaint in this case alleged violations of the Federal Trademark Act including infringement of the U.S. Olympic Committee's registered mark "Olympic." Since the district court's summary judgment was based solely on § 380, the Trademark Act claims were not before the Ninth Circuit on appeal.

[6] Section 380 also incorporates by reference the remedial provisions of the Federal Trademark Act, but not other substantive provisions. See Petition at A64; *United States Olympic Committee v. Intelicense Corporation, S.A., supra*, 737 F.2d at 267.

ferences which preclude the blind application of trademark rules and principles to this statute.

> While [§ 380] serves some of the same purposes as the Federal Trademark Act, its direct purpose is to benefit the public by ensuring that any use of an Olympic designation is authentic.

U.S. Olympic Committe v. International Federation of Bodybuilders, supra, 219 U.S.P.Q. at 360. *Accord, United States Olympic Committee v. Union Sports Apparel*, 220 U.S.P.Q. 526, 529 (E.D.Va. 1983).

Congress had good reason to protect against unauthorized exploitation of "Olympic" for purposes other than simply to prevent public confusion. For example, even if use of "Olympic" were not likely to cause confusion as required by the Federal Trademark Act,[7] the U.S. Olympic Committee would still be damaged by *dilution* of the trade value of the designation. As one court noted: "The scope of protection afforded by [§ 380] is broader than trademark protection, and is more akin to that of an antidilution statute." *U.S. Olympic Committee v. International Federation of Bodybuilders, supra*, 219 U.S.P.Q. at 360. *See, generally*, 2 J. McCarthy, Trademarks and Unfair Competition, (2d Ed. 1984) § 24:13, pp. 212-223, 3A Callmann, The Law of Unfair Competition Trademarks and Monopolies (4th Ed. 1983) § 21.11, pp. 33-47.

The dilution doctrine grants protection to marks beyond the classic "likelihood of confusion" test where

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[7] Section 32 of the Trademark Act makes actionable uses of marks which are "likely to cause confusion, to cause mistake, or to deceive." 15 U.S.C. § 1114(1).

use of a mark by another dilutes the distinctive quality of the mark.[8] Implicit in Petitioners' argument is that § 32 of the Trademark Act, which requires proof of a likelihood of confusion to find infringement, reaches the constitutional limits of Congress' power to regulate trade designations. However this Court has recognized that the State may enact protections which are broader than § 32, noting, for example, that "§ 43(a) [of the Federal Trademark Act] prohibits a broader range of practices than does § 32, as may

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[8] In applying the New York anti-dilution statute, the New York Court of Appeals explained its purpose to prevent "the whittling away of any established trademark's selling power and value through its unauthorized use by others on dissimilar products."

> The evil which the Legislature sought to remedy was not public confusion caused by similar products or services sold by competitors, but a cancer-like growth of dissimilar products or services which feeds upon the business reputation of an established distinctive trademark or trade name.

Allied Maintenance v. Allied Mechanical Trades, 42 N.Y.2d 538, 399 N.Y.S.2d 628, 369 N.E.2d 1162 (1977). *See also, Hyatt Corp. v. Hyatt Legal Services*, 736 F.2d 1152 *cert. den.*, 105 S.Ct. 434 (1984).

Another court described this damage of dilution differently. In enjoining the use of "MASTERS" as part of the name of a golf tournament, the court recognized that:

> If the suspect name is used, there is reasonable certainty that the value of plaintiff's mark will be eroded; a little now, more later, until the "magic" of the Masters will be mortally dissipated if not completely dispelled.

Augusta National, Inc. v. Northwestern Mutual Life Ins. Co., 193 U.S.P.Q. 210 (S.D. Ga. 1976). The Constitution does not prohibit protecting the value of "Olympic" any more than other trade designations which are routinely given protection by the courts.

the state unfair competition law. . . ." *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 858 (1982).

By protecting against the dilution of Olympic-related designations, Congress has been able to "safeguard the [U.S. Olympic Committee's] ability to raise the financial resources that are a critical component of America's capacity to send world-class amateur athletes into international competition without the massive government subsidies enjoyed by competitors from other nations." *U.S. Olympic Committee v. Intelicense Corporation, S.A., supra*, 737 F.2d at 264.

II. The Decision Below Does Not Conflict With The Decisions of This Court or The Constitution.

A. Neither § 380 nor its application to Petitioners violates the First Amendment

Petitioners have mischaracterized the scope of the judgment entered. The judgment in this case does not prohibit Petitioners "from using 'Olympic' in virtually any context" as contended in the Petition. (Petition at 41). Nor did the court hold "that Section 380 gave [the U.S. Olympic Committee] the power to prohibit all uses of 'Olympic' by any person, whether or not for commercial and trademark purposes. . . ." (Petition at 20-21). The judgment is quite limited, as is § 380 itself, and thus avoids constitutional infirmities.

To the extent that Petitioners wish to comment upon or to protest against the Olympics, the injunction does not prohibit them from doing so. In affirming the grant of a preliminary injunction,[9] a unanimous panel of the Ninth Circuit Court of Appeals held:

---

[9] The scope of the preliminary injunction is essentially the same as the scope of the final judgment—both track the statutory language of § 380.

> The injunction accords with the provisions of 36 U.S.C. § 380 and is not overbroad. *Appellants are not enjoined from making factually correct statements which mention the Olympic Games.*

(Petition at A85, emphasis added).

In affirming the permanent injunction, a different unanimous Ninth Circuit panel showed equal sensitivity to the First Amendment considerations raised by Petitioners. Because the application of § 380 had no practical effect on Petitioners' ability to conduct their programs, and because there were satisfactory alternative means for Petitioners to express themselves,[10] the court found that the First Amendment did not entitle Petitioners to appropriate the U.S. Olympic Committee's property rights in the designation "Olympic." (Petition at A 11-13, 781 F.2d at 737).

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[10] *See, Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). Petitioners successfully conducted their competition as Gay Games I, and recently concluded Gay Games II. As the Second Circuit Court of Appeals held in a trademark case:

> Because there are numerous ways in which defendants may comment on "sexuality in athletics" without infringing plaintiff's trademark, the district court did not encroach upon their first amendment rights in granting a preliminary injunction. • • •
>
> "• • • This is not a case of government censorship, but a private plaintiff's attempt to protect its property rights. The propriety of a preliminary injunction where such relief is sought is so clear that courts have often issued an injunction without even mentioning the first amendment."

Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 204 (2d Cir. 1979).

The U.S. Olympic Committee has never suggested that § 380 prohibits *all uses* of "Olympic." This has been recognized by the courts which have enforced § 380. As Chief Judge Peckham wrote:

> We have already explained, however, that Section 380 does not establish a per se rule against the use of Olympic words and symbols but only grants the [U.S. Olympic Committee] their exclusive use within "a range of uses."

(Petition at A122, 219 U.S.P.Q. at 987).

Despite Petitioners' cry that § 380 gives the U.S. Olympic Committee the "power to control the nation's political vocabulary" (Petition at 25), the statute is limited to uses of Olympic "for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance or competition." When one court found that "Olympic" was being used for political speech, it held that such use was not prohibited by § 380 because it was outside this "range of uses" prohibited by the statute. *Stop the Olympic Prison v. U.S. Olympic Committee*, 489 F. Supp. 112 (S.D.N.Y. 1980).[11]

In contrast, Petitioners used "Olympic" to draw attention to their own international athletic compe-

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[11] Contrary to Petitioners' statement, Petition at 11, the *Stop the Olympic Prison* case was not brought by the U.S. Olympic Committee, but was a declaratory judgment brought *against* the U.S. Olympic Committee. Consequently, the plaintiff in that case was not a litigative target as claimed by Petitioners.

Also contrary to Petitioners' contention, the courts below did not ignore that case. Rather, it was cited with approval to show the limitations of the scope of § 380.

tition—deliberately patterned after the Olympic Games conducted by Respondents. Like the U.S. Olympic Committee, Petitioners used "Olympic" on fund-raising items, such as T-shirts, posters and buttons. Petitioners seek to use "Olympic" within the defined range of uses proscribed by Congress. The value in so using "Olympic" was created by the efforts of Respondents and the enormous success of the modern Olympic Games. Petitioners seek a free ride on the goodwill created by Respondents, cloaking their short-cut to popularity in the First Amendment.

Petitioners argue that because their use of Olympic is not for profit, they have a greater right to use "Olympic." SFAA's status as a nonprofit corporation does not remove its activities from trade, or make otherwise commercial activities non-commercial. *American Medial Association v. United States*, 130 F.2d 233, 237, *aff'd*, 317 U.S. 519 (1943) ("It is not necessary, in order to constitute trade or business, that it shall be carried on for profit.") Indeed, the U.S. Olympic Committee is itself a non-profit organization, 36 U.S.C. § 378, and it would be anomalous to find that it could not protect its rights against other such organizations.

Petitioners urge that the First Amendment requires this Court to read into § 380, the provision of the Federal Trademark Act that deems non-infringing, the "use, *otherwise than as a trade or service mark* . . . of a term or device which is descriptive of and used fairly and in good faith *only to describe* to users the goods or services. . . ." 15 U.S.C. § 1115(b)(4) (emphasis added). However, this provision is inapplicable to § 380 which contains no such language. Section § 380 is, instead, self-limited in its application to a

defined range of uses set forth in the statute. The defense is also unavailable since Petitioners' use of "Olympic" was use as a trademark, not use in a descriptive fashion.[12] It was used as "a symbol that attracts public attention". *Beer Nuts, Inc. v. Clover Club Foods Co.*, 711 F.2d 934 (9th Cir. 1983).

Although injunctive relief is usually granted in trademark, copyright and other similar cases, Petitioners argue that the injunction is overbroad because they offered to include a disclaimer with their use of Olympic. (Petition at 44-46). However, as this Court has observed, the Constitution does not require that such disclaimers be permitted: "there is no First Amendment rule . . . requiring a State to allow deceptive or misleading commercial speech whenever the publication of additional information can clarify or offset the effects of the spurious communication." *Friedman v. Rogers*, 440 U.S. 1, 12, at n.11 (1979).

As the court found in this case,

> use of a disclaimer would undermine the purpose of the Amateur Sports Act of 1978 and, in effect, [would] countenance allowing any infringer, however objectionable, to use "Olympic," as long as it expressly [disavowed] any connection with the [U.S. Olympic Committee].

(Petition at A65-66).

---

[12] Petitioners used "Olympic" as a dominant part of the name of their international athletic competition, and prominently featured "Olympic" on fund-raising and promotional materials.

B. The U.S. Olympic Committee is Not Engaged in State Action.

Petitioners First Amendment and equal protection Constitutional claims are premised on the erroneous supposition that the U.S. Olympic Committee's enforcement of § 380 is "State action." (Petition at 36). This Court has clearly held that to make private activity "State action," the level of governmental involvement in the private activity must be substantial, and that in order to fall within the ambit of the constitutional prohibition against discrimination, the State must have significantly involved itself with invidious discrimination. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972).

The U.S. Olympic Committee "exists and operates independently of the Federal government." *DeFrantz v. U.S. Olympic Committee*, 492 F.Supp. 1181, 1193 (D.D.C.) *aff'd per curiam*, 701 F.2d 2216 (D.C. Cir. 1980). In *DeFrantz*, the complained of action was a vote by the U.S. Olympic Committee not to send athletes to the 1980 Summer Olympics in Moscow. In reaching its holding, the court fully addressed the tests of *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). Even though the vote was taken at the specific request of the President and Vice-President of the United States as well as in response to Congressional resolutions, the court held that there was no State action. Clearly, if State action was not present in that extreme case, it is not present here.

Martin v. International Olympic Committee, 740 F.2d 670 (9th Cir. 1984), cited by Petitioners, involved a high degree of cooperation and coordination between the city of Los Angeles and the independent local organizing committee which conducted the 1984

Summer Olympics. In that case, the court held that the local committee's conduct constituted State action. None of the facts critical to that decision are present in this case. The U.S. Olympic Committee acted independently of any governmental involvement.

If the U.S. Olympic Committee's enforcement of its rights were to be held to be State action merely by virtue of having sought relief in federal court, then enforcement of other statutes giving similar property rights to private parties would also be State action. Thus enforcement of the Trademark Act and the Copyright Act would be unconstitutional because they also empower private parties to assert their rights against defendants they choose. Enforcement of such private rights does not constitute State action or raise a constitutional question.

CONCLUSION

For the foregoing reasons, this case does not present any constitutional questions appropriate for review by this Court and the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 86-270

In the Supreme Court of the United States

OCTOBER TERM, 1986

SAN FRANCISCO ARTS & ATHLETICS, INC.
and THOMAS F. WADDELL, M.D.
Petitioners,

vs.

UNITED STATES OLYMPIC COMMITTEE
and INTERNATIONAL OLYMPIC COMMITTEE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX I

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PETITION FOR CERTIORARI FILED AUGUST 19, 1986
CERTIORARI GRANTED OCTOBER 20, 1986

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RELEVANT DOCKET ENTRIES

Date	Entry
August 9, 1982	Complaint filed.
August 9, 1982	Plaintiffs' Application for TRO and moving papers for preliminary injunction filed.
August 9, 1982	TRO granted after hearing.
August 16, 1982	Supplemental papers in support of preliminary injunction filed.
August 16, 1982	Papers in opposition to preliminary injunction filed.
August 19, 1982	Reply papers in support of preliminary injunction filed.
August 19, 1982	Hearing on motion for preliminary injunction held.
August 20, 1982	Order granting preliminary injunction filed.
August 23, 1982	Preliminary injunction issued.
August 23, 1982	Defendants' notice of appeal from preliminary injunction filed.
August 23, 1982	Defendants' ex parte motion for order staying preliminary injunction filed and denied.
August 27, 1982	Answer to complaint and counterclaims filed.
September 20, 1982	Answer to counterclaims filed.
November 8, 1982	Defendants' discovery papers filed.

RELEVANT DOCKET ENTRIES (Continued)

Date	Entry
February 9, 1983 & April 7, 1983	Plaintiffs' responses to defendant's discovery filed.
June 15, 1983	Notice of affirmance of preliminary injunction by U.S. Court of Appeals for Ninth Circuit issued.
July 29, 1983	Defendants' discovery papers filed.
September 16, 1983	Plaintiffs' moving papers for summary judgment filed.
September 22, 1983	Defendants' responses to plaintiffs' discovery filed.
October 3, 1983	Defendants' papers opposing summary judgment filed.
October 7, 1983	Reply papers in support of summary judgment filed.
February 2, 1984	Hearing on motion for summary judgment held and summary judgment granted.
February 16, 1984	Summary judgment entered.
March 15, 1984	Defendants' notice of appeal from summary judgment filed.
April 16, 1984	Plaintiffs' moving papers for attorneys' fees award filed.
May 10, 1984	Defendants' opposition to motion for attorneys' fees filed.
May 17, 1984	Reply papers in support of motion for attorneys' fees filed.

RELEVANT DOCKET ENTRIES (Continued)

Date	Entry
May 24, 1984	Hearing on motion for attorneys' fees held and attorneys' fees award granted.
September 21, 1984	Written order granting attorneys' fees issued.
April 1, 1985	Order of U.S. Court of Appeals for Ninth Circuit staying execution of judgment issued.
January 27, 1986	Opinion of U.S. Court of Appeals for Ninth Circuit affirming summary judgment and reversing and remanding attorneys' fees issued.
February 10, 1986	Petition for rehearing and suggestion of *en banc* review filed.
May 22, 1986	Order denying rehearing and *en banc* review and amending opinion of January 27, 1986 issued.
May 28, 1986	Opinion of Judges Kozinski, Pregeson and Norris dissenting from *en banc* review issued.
August 19, 1986	Petition for certiorai filed.
October 20, 1986	Certiorai granted.

In the Supreme Court of the United States
JANUARY TERM, 1987

File Date: August 9, 1982

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

INTERNATIONAL OLYMPIC COMMITTEE, a corporation organized and existing under the laws of Switzerland; UNITED STATES OLYMPIC COMMITTEE, a corporation organized and existing under the laws of the United States of America,

Plaintiffs,

VS

SAN FRANCISCO ARTS & ATHLETICS, a California corporation; THOMAS F. WADDELL,

Defendants.

No. C-82-4183 RFP
Complaint:
(Copyright/Trademark/Unfair Competition)

JURISDICTION

1. This action seeks relief under the International Convention for the Protection of Intellectual Property and for unfair competition (15 U.S.C. § 1126(h)), for violation of the Amateur Sports Act of 1978 (36 U.S.C. § 371, et seq.), for Federal trademark infringement (15 U.S.C. § 1114); for false designation of origin, false description or representation (15 U.S.C. § 1125 (a)); for breach of contract between the parties; and for dilution of plaintiffs' distinctive marks (Cal.Bus. & Prof.Code, § 14330). The jurisdiction of this court arises under sections 1337 and 1338 of Title 28, United States Code. In addition, the court has jurisdiction because of the existence of a Federal question (28 U.S.C. § 1331).

PARTIES

2. Plaintiff, *INTERNATIONAL OLYMPIC COMMITTEE* ("IOC"), is a nonprofit organization created by the Congress of Paris of June 23, 1894, and organized and existing under the laws of Switzerland. IOC's principal place of business is Lausanne, Switzerland. Plaintiff, *UNITED STATES OLYMPIC COMMITTEE* ("USOC"), is a pri-

vate, nonprofit corporation duly chartered and existing under the laws of the United States of America (36 U.S.C. § § 371-396), having its principal place of business at Colorado Springs, Colorado. USOC does business in California and elsewhere in interstate commerce.

3. Defendant, *SAN FRANCISCO ARTS & ATHLETICS* ("SFAA"), is a corporation organized and existing under the laws of California, having its principal place of business in the City and County of San Francisco. SFAA does business in California and elsewhere in interstate and foreign commerce. Defendant *THOMAS F. WADDELL* ("Waddell") is a resident of the City and County of San Francisco. Plaintiffs are informed and believe, and on that ground allege, that Waddell is an organizer of SFAA and is its chairman.

FIRST CLAIM FOR RELIEF:
PROTECTION OF FOREIGN CORPORATIONS FROM UNFAIR COMPETITION AND TRADEMARK INFRINGEMENT, 15 U.S.C. § 1126(h)

4. IOC is entrusted with the control and development of The Olympic Games which are IOC's exclusive property and to which IOC owns all rights over their organization and control. USOC is responsible for protecting IOC and the Olympic movement in the United States and the integrity of The Olympic Games when held in the United States. The 1984 Olympic Games are scheduled to be held in the City of Los Angeles, California.

5. Switzerland and the United States are signatories to the International Convention for the Protection of Intellectual Property (21 U.S.T. 1583, T.I.A.S. No. 6923).

6. Beginning at a time unknown to plaintiffs but not later than 1981, and continuing thereafter, defendants have organized a series of athletic competitions and events to be conducted in San Francisco. These athletic competitions and

events are to be conducted commencing on or about August 28, 1982. Plaintiffs are informed and believe, and on that ground allege, that defendants will begin festivities preliminary to such athletic competitions and events before August 28 and may, in fact, have already begun such preliminary activities; to wit, the carrying of the flaming Olympic torch across the Untied States.

7. Since at least December 1981, defendants have used "Olympic" in connection with the competitions and events described in paragraph 6, above. Specifically, defendants have promoted their competitions and events as the "Gay Olympics" or "Gay Olympic Games," have published a newsletter entitled "Gay Olympics," have printed or caused to be printed and have distributed brochures, flyers, tee shirts, bumper stickers, buttons and other materials which use "Olympic" and the phrases "Gay Olympics" or "Gay Olympic."

8. Plaintiffs are informed and believe, and on that ground allege, that SFAA attempted to register "Gay Olympic Games" as its California corporate trade name, but was informed that use of "Olympic" was not permitted, and was further informed that any use of "Olympic" was prohibited without authorization of USOC.

9. On December 23, 1981, USOC requested that the defendants cease and desist from using "Olympic" in consideration of forebearance by USOC of its right to bring legal action to enforce its rights. Plaintiffs did in fact forebear from enforcing their rights. Plaintiffs are informed and believe, and on that ground allege, that defendants ceased use of "Olympics" and instead called their athletic competitions and events "The Gay *Athletic* Games." Subsequently, defendants resumed use of "Olympic" to the detriment of plaintiffs.

10. Defendants have and will continue to compete unfairly with plaintiffs, through the unauthorized use of "Olympic" as well as the various recognized Olympic symbols including the "Olympic Torch" and the "Olympic Flame."

11. Plaintiffs have been and will continue to be immediately and irreparably injured by defendants' conduct as a result of the loss of plaintiffs' exclusive control and jurisdiction over The Olympic Games, the loss of plaintiffs' reputation and goodwill due to mistaken affiliation or association of defendants with The Olympic Games or deception engendered by defendants' continued misuse of "Olympic" and plaintiffs' other exclusive names, marks, designations, symbols, emblems and ensignia.

12. Plaintiffs have no plain, speedy or adequate remedy at law to redress defendants' misconduct.

13. Plaintiffs have necessarily engaged the services of counsel to represent them in the preparation and prosecution of the within action. The legal services rendered and to be rendered will inure to the benefit of the citizens of the United States of America as a whole in that defendants' unlawful conduct unfairly competes with The Olympic Games and the Olympic movement, interferes with the exclusive jurisdiction and control of plaintiffs over The Olympic Games and the Olympic movement and is contrary to the public interest. Such benefits will be derived in part through the efforts of plaintiffs who, therefore, request the Court in its discretion to fix the reasonable value of their attorneys' fees and litigation expenses and assess the amount thereof against defendants.

W h e r e f o r e, plaintiffs seek relief as hereinafter set forth.

SECOND CLAIM FOR RELIEF:
VIOLATION OF OLYMPIC
COMMITTEES' EXCLUSIVE
JURISDICTION PROVISIONS OF
AMATEUR SPORTS ACT OF 1978,
36 U.S.C. § § 373, 374

14. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 9, and 11 through 13, above.

15. USOC has exclusive authority to organize, finance and control the representation of the United States in The

Olympic Games and to exercise exclusive jurisdiction over organization of The Olympic Games when held in the United States.

16. Defendants have organized and promoted and will continue to promote international athletic competitions and events identified by defendants as "Olympic Games," in violation of provisions of the Amateur Sports Act of 1978 granting USOC exclusive jurisdiction to organize and control United States participation in The Olympic Games (36 U.S.C. § § 373, 374).

W h e r e f o r e, plaintiffs seek relief as hereinafter set forth.

THIRD CLAIM FOR RELIEF:
VIOLATION OF OLYMPIC SYMBOLS PROTECTION PROVISIONS OF THE AMATEUR SPORTS ACT OF 1978, 36 U.S.C. § 380

17. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 9, and 11 through 13, above.

18. USOC possesses the exclusive right to use "Olympic" and "Olympiad" and the various other names, marks, designations, symbols, emblems and ensignia of The Olympic Games, and combinations and simulations thereof, in the United States for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance or competition.

19. USOC derives the bulk of the funds needed to support United States participation in The Olympic Games by authorization of the use of "Olympics" and the various names, marks, designations, symbols, emblems and ensignia referred to in paragraph 18.

20. Unless defendants are enjoined, they will continue to use "Olympics" and the various other names, marks, designations, symbols, emblems and ensignia of The Olympic Games in violation of the Olympic Symbol Protection provisions of the Amateur Sports Act of 1978 (36 U.S.C. §

380). As a proximate result of such conduct, plaintiffs have suffered and will continue to suffer immediate and irreparable injury, loss and damage, in that the value of plaintiffs' name will be impaired, and plaintiffs' business reputation and goodwill will be injured and plaintiffs' exclusive right to use "Olympics" in the United States will have been deprived.

W h e r e f o r e, plaintiffs seek relief as hereinafter set forth.

FOURTH CLAIM FOR RELIEF BY PLAINTIFF USOC AGAINST DEFENDANTS: TRADEMARK INFRINGEMENT, 15 U.S.C. § 1114

21. Plaintiff USOC incorporates by reference the allegations of paragraphs 1 through 9, 11 through 13, and 18 through 19, above.

22. Continuously since 1896, USOC and its predecessors have used "Olympics" for promoting, publicizing, and controlling the participation of the United States in The Olympic Games, as well as in representing the United States by selecting and obtaining the most competent amateur representation for competitions and events of The Olympic Games. This is evidenced by, inter alia, United States Service Mark Registration No. 789,795, and United States Trademark Registration No. 968,566, which are in full force and effect thereby constitute conclusive evidence of USOC's ownership of and exclusive right to use "Olympics" as a registered mark in commerce for such goods and services, as provided by 15 U.S.C. section 1065 and 1115.

23. Defendants, without authorization by USOC, have used "Olympics" in this judicial district and elsewhere for the solicitation of funds, for the purpose of trade, to induce the sale of goods and services, and to promote a theatrical exhibition, athletic performance or competition. Defendants' acts constitute infringement of USOC's registered mark.

24. Unless defendants are enjoined from using "Olympics," defendants will continue such use. As a proximate result, USOC has suffered and will continue to suffer immediate

and irreparable injury, loss and damage in that the public will be confused, the value of USOC trade and service marks will be impaired, and USOC's business reputation and goodwill will be injured. USOC has no plain, speedy or adequate remedy at law to redress the above misconduct.

W h e r e f o r e, plaintiff USOC seeks relief as hereinafter set forth.

FIFTH CLAIM FOR RELIEF:
FALSE DESIGNATION OF ORIGIN, FALSE DESCRIPTION OR REPRESENTATION
15 U.S.C. § 1125(a)

25. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 9, 11 through 13, and 18 through 19, above.

26. Defendants are not associated with any Olympic activity and plaintiffs have never authorized defendants to use "Olympics" for any purpose.

27. Defendants' use of "Olympics" constitutes deceptive matter which may falsely suggest a connection with an Olympic activity, by creating the false impression that defendants' activities, products and services are promoted, sanctioned, or conducted as an Olympic activity organized, conducted or authorized by plaintiffs.

28. Use by plaintiffs of "Olympics" in the organization of international amateur athletic competition and selection of athletes to participate in The Olympic Games is well and favorably known throughout the United States and the world, and the goodwill and reputation of The Olympic Games associated therewith have been and will continue to be jeopardized by defendants' unauthorized use of "Olympics" and efforts to organize "Olympics Games," to the extent that the public will be deceived by the mistaken belief that defendants' activities, goods and services are in some way associated or connected with an Olympic activity, or sponsored, promoted, sanctioned, authorized, certified, organized or conducted by plaintiffs.

29. Unless defendants are enjoined from using "Olympics," defendants will continue such use. As a proximate result of defendants' action, plaintiffs have suffered and will suffer immediate and irreparable injury, loss and damage in that the public will be deceived, the value of plaintiffs' trade names and marks will be impaired, and plaintiffs' business reputation and goodwill will be injured. Plaintiffs have no plain, speedy or adequate remedy at law to redress the above misconduct.

W h e r e f o r e, plaintiffs seek relief as hereinafter set forth.

SIXTH CLAIM FOR RELIEF BY PLAINTIFF USOC AGAINST DEFENDANTS: BREACH OF CONTRACT

30. USOC incorporates by reference the allegations in paragraphs 1 through 9, 11 through 13, and 18 through 19, above.

31. On or about January 18, 1982, USOC and defendant Waddell entered into a contract providing that defendants, and both of them, would cease using "Olympic." In consideration, USOC agreed to forego bringing legal action to enjoin such unlawful and infringing use.

32. The purpose of the agreement was to prevent confusion or deception of the public that defendants, or either of them, had any association with any activity of plaintiffs.

33. USOC is informed and believes, and on that ground alleges, that defendants ceased use of "Olympic" in connection with their planned athletic competitions and events and instead called them the "Gay *Athletic* Games." Subsequent to their said agreement, defendants unilaterally repudiated their agreement and resumed use of "Olympic."

34. Unless defendants are enjoined from using "Olympic," defendants will continue such use. As a proximate result of defendants' actions, USOC has suffered and will suffer immediate and irreparable injury, loss and damage in that the public will be confused and deceived, the value of

plaintiffs' name will be impaired, and plaintiffs' business reputation and goodwill will be injured. USOC has no plain, speedy or adequate remedy at law to redress the above misconduct.

W h e r e f o r e, USOC seeks relief as hereinafter set forth.

SEVENTH CLAIM FOR RELIEF: DILUTION

35. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 9, 11 through 13, and 18 through 19, above.

36. Defendants' unauthorized, knowing and intentional misuse of "Olympic" is likely to injure the reputation of plaintiffs and The Olympic Games by diluting the distinctive quality of "Olympic" as a designation associated with plaintiffs and The Olympic Games in violation of section 14330 of the California Business and Professions Code.

37. Unless defendants are enjoined from using "Olympic," plaintiffs will suffer immediate and irreparable injury by the dilution of the distinctive quality of their name. Plaintiffs have no plain, speedy or adequate remedy at law to redress the above misconduct.

PRAYER FOR RELIEF

W h e r e f o r e, plaintiffs pray for relief and judgment as follows:

1. For an order temporarily restraining, preliminarily and permanently enjoining defendants, and each of them:

(a) From using or causing to be used in any form whatever, for the purpose of trade or for any other purpose, including but not limited to theatrical exhibitions, athletic competitions or events, "Olympic," or any other trademark, service mark, trade name, designation, symbol, emblem or ensignia of plaintiffs, or any combination or simulation thereof;

(b) From making any statement or representation

tending to cause any person to believe that defendants, their agents, employees, officers, attorneys, representatives or any person participating or acting in concert with them, or any of them, are in any way connected with plaintiffs or with any Olympic activity; and

(c) From distributing, selling or in any manner whatever conveying any goods, services, documents or other tangible things which use "Olympic," or any other trademark, service mark, trade name, designation, symbol, emblem or ensignia of plaintiffs, or any combination or simulation thereof.

2. For an order that all documents, signs, brochures, flyers, shirts, bumper strips, printed matter of any kind and other tangible things in defendants' possession, bearing "Olympic" or any trademark, service mark, trade name, designation, symbol, emblem or ensignia of plaintiffs, or any combination or simulation thereof, be delivered up to plaintiffs for destruction.

3. For attorneys' fees and costs of suit herein.

4. For such other and further relief as the Court may deem proper.

Dated: August 9, 1982.

(Names omitted, J.A. 5, above)
Vaughn R. Walker (Signed)
Attorneys for Plaintiffs,
International Olympic Committee
and United States Olympic Committee

File Date: August 9, 1982

(Names & caption omitted in printing, see J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Memorandum in Support of Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction

PRELIMINARY STATEMENT

Plaintiffs *INTERNATIONAL OLYMPIC COMMITTEE* ("IOC") and *UNITED STATES OLYMPIC COMMITTEE* ("USOC") seek to enjoin defendants from using "Olympic" in connection with organizing and conducting athletic competitions or events scheduled to commence on or about August 28, 1982. Preliminary festivities of these competitions — carrying the flaming Olympic torch across the country — may have already began or will begin before plaintiffs could bring on a request for preliminary injunction by regularly noticed motion.

The Olympic Games are the exclusive property of IOC. The Amateur Sports Act of 1978 (36 U.S.C. § 371 et seq.) grants to USOC sole authority to control United States participation in The Olympic Games and empowers USOC to prevent misuse of "Olympic" and the other distinctive trade name, trademark and service mark, emblems, symbols and ensignia of The Olympic Games. USOC's rights of action under the Amateur Sports Act are in addition to any rights of action USOC may have for unfair competition and trademark infringement under the Trademark Laws of the United States (15 U.S.C. § § 1125a, 1114) or for dilution under the California Business and Professions Code § 14330.

Specifically, section 380 of the Amateur Sports Act, in part, provides:

"(a) Without the consent of the USOC, any person who uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition

* * * * *

"(4) the words "Olympic" * * * or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the [USOC] or any Olympic activity;

"shall be subject to suit in a civil action by the [USOC] for remedies provided in *** the Trademark Act of 1946.***"

Plaintiffs demonstrate in the affidavits filed herewith that in December of 1981, a USOC representative discovered that SFAA contemplated organizing athletic competitions and in that connection using "Olympic." USOC's Executive Director immediately sent a letter on December 23, 1981 demanding that SFAA cease all use of "Olympic" (Miller Aff.). SFAA Chairman, Dr. Thomas Waddell, a former Olympian himself, wrote to USOC indicating a prior awareness that unauthorized use of "Olympic" was impermissible. Waddell enclosed additional unauthorized "Olympic" materials that appealed for public donations by making reference to the "Olympic Committee" and "Olympic Headquarters." Waddell requested USOC's permission for use of these materials (Miller Aff.). In response, USOC reiterated its position and again demanded that both SFAA and Waddell cease use of "Olympic." Between January 13-15, 1982, USOC's executive director had a telephone conversation with Waddell regarding USOC's position. During this conversation, USOC's need to control use of "Olympic" was explained, as was the fact of authorization which had been given to the "Special Olympics" for the handicapped, and "Junior Olympics" for young athletes, pursuant to USOC's express mandate from Congress to provide for athletic

development of these special groups (see 36 U.S.C. § 374(1), (6) and (13)). An oral agreement was reached during that conversation that defendants would cease use of "Olympic." This agreement was confirmed by letter of January 18, 1982 from Dr. Waddell (Miller Aff.). In that letter defendants stated their commitment to substitute "Athletic" in place of "Olympic" and plaintiffs' counsel later received materials indicating that defendants had substituted the name "Gay *Athletic* Games " (Kline Aff.).

Shortly thereafter, Waddell wrote USOC's executive director. The letter expressed some dissatisfaction with the agreement. USOC's counsel responded, notifying defendants that they were expected to abide by their agreement to cease use of "Olympic" because USOC was abiding by its agreement not to bring suit to enforce its rights (Kline Aff.). In response, SFAA had its attorney write to USOC approximately two weeks later, stating the defendants' legal position that the agreement was, for various reasons, void or unenforceable (Kline Aff.). That letter contained a number of misconceptions, including, for example, that USOC was a governmental agency. In an effort to avoid a confrontation, USOC counsel responded, explaining the errors and referring to supporting legal authority. The USOC did not hear from defendants until discovery months later that defendants had resumed use of "Olympic" (Kline Aff., Preston Aff.)

During the interim, however, and believing the matter had been amicably resolved, a report was made to USOC Administrative Committee on April 16, 1982, that the defendant had written agreeing to discontinue use of "Olympic" (Kline Aff.).

USOC's first indication that defendants had resumed use of "Olympic," was early June 1982. A newspaper article from the San Francisco Sunday Examiner & Chronicle reported that the defendant intended to continue use of "Olympic" in connection with its athletic games. Shortly thereafter, USOC counsel initiated an investigation to ascertain whether, in fact, defendant had resumed use of "Olympic" in connection

with organizing international sports competitions (Kline Aff.).

As a result of that investigation, the Olympic Committee received on approximately June 17, 1982, a package of materials from the defendant. These materials included two large packets of douments which referred only to the "Gay *Athletic* Games" precisely as defendant previously had indicated it would do in its letter from Dr. Waddell of January 18, 1982 (Kline Aff.). However, some additional materials were also included, apparently of more recent origin, that once again used the term "Olympic Games" (Kline Aff.)

Because of this apparent resumption of unauthorized use, USOC informed IOC during a regularly scheduled meeting held in London, England, during the week of June 28, 1982 of the apparent contractual breach (Miller Aff.). This meeting was followed by telephone discussions on July 7 between USOC's counsel and counsel for IOC which were resumed at a meeting of those counsel on July 15, 1982 (Kline Aff.). On July 22, 1982, a draft complaint was forwarded by USOC to IOC. That complaint also was presented on July 23 at a regularly scheduled meeting of the USOC Administrative Committee on July 22-28, 1982, when a recommendation to bring this action was unanimously approved.

Apart from violations of the Amateur Sports Act, defendants are also liable for trademark infringement under the Federal Trademark Act, 15 U.S.C. section 1114(a). USOC owns valid Federal service mark and trademark registrations of "Olympic," both for services promoting, publicizing, and controlling the participation of the United States in the Olympic Games (Reg. No. 789,795) and for promotional material and souvenirs as well as advertisements to raise money to support the "Olympic" Games (Reg. No. 963,566). Defendants' promotional material and advertising for souvenir and contributions featuring "Olympic" directly conflicts with USOC's Federally registered "Olympic" marks.

Defendants were free to promote their activities in many ways without utilizing the "Olympic" theme. Instead, defendants chose to take a ride on the widespread public recognition and goodwill that surrounds any "Olympic" activity, such as the Olympic Games, by misappropriating USOC's registered OLYMPIC mark. Misuse of this registered OLYMPIC mark by defendants occurred in connection with offering of souvenirs for sale in newsletters and advertisements promoting its "Olympic" activities, uses embraced by the registrations protecting USOC's "Olympic" marks. Therefore, the statutory right to relief under 15 U.S.C. section 1114(1) has been fully met.

ARGUMENT

I. DEFENDANTS HAVE VIOLATED THE AMATEUR SPORTS ACT OF 1978.

The Amateur Sports Act of 1978, P.L. 95-606,92 Stat. 3045, created a new and independent cause of action, by which USOC could protect the distinctiveness, value and marketability of various "Olympic" designations. The Olympic Protection provision of the Act (36 U.S.C. § 380) protects USOC from any misuse of "Olympic," regardless of the particular goods or service. The scope of protection afforded is akin to that of an anti-dilution statute, such as section 14330 of the California Business and Professions Code.*

The scope of protection provided by anti-dilution statutes is considerably greater than that provided by traditional trademark or unfair competition theories in that protection does not depend upon the nature of the goods or services involved. Such statutes are "designed to prevent the gradual

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* Certain uses of "Olympic" are, of course, not prohibited by the Olympic Protection Statute. For example, uses of the word "Olympic" in news stories about the Olympics are not prohibited. This is provided for in the preamble of 36 U.S.C. § 380(a) which states that the uses of Olympic terminology that are prohibited are those done "for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance of competition."

whittling away of a firm's distinctive trademark or name" (*Allied Maintenance* v. *Allied Mechanical Trades* (1977) 300 N.E.2d 1162, 309 N.Y.S.2d 628).

As the New York Court of Appeals noted:

> "[I]t would be of no significance under our statute that Tiffany's Movie Theatre is not a competitor of, nor likely to be confused with Tiffany's Jewelry * * * It is not difficult to imagine the possible effect which the proliferation of various non-competitive business utilizing the name Tiffany's would have upon the public's association of the name Tiffany's solely with fine jewelry. The ultimate effect has been appropriately termed dilution."

Dilution of a trademark can seriously injure the mark's owner. As the public sees the mark on numerous different products the impact and value of the mark can only deteriorate. Moreover, the reputation of the trademark owner may, through undesirable mental associations by the public, become subject to tarnishment. Thus the rationale underlying the Olympic Protection statute is similar to that underlying an anti-dilution statute. That is "[t]he evil which the Legislature sought to remedy was not public confusion caused by similar products or services sold by competitors, but a cancer-like growth of dissimilar products or services which feeds upon the business reputation of an established distinctive trademark or name."

Thus subsection (a) of the Olympic Protection statute makes actionable any use in trade of "Olympic," whether or not such use would be actionable on a trademark or unfair competition theory. Further, subsection (c) provides that USOC shall have the exclusive right to use "Olympic." Thus, any unauthorized use of "Olympic" would be unlawful. By reserving the exclusive use of "Olympic" to USOC, the Olympic Protection statute forecloses the possibility of any other party obtaining any protectable rights in "Olympic." This permits USOC to utilize "Olympic" for all goods and services.

While the Olympic Protection statute serves some of the same purposes as the Federal Trademark act, its direct purpose is to benefit the public by ensuring that any use of "Olympic" is authentic. Subsection(b) of section 380 is Congress' recognition, endorsement, and express authorization of USOC's corporate participation program. It provides that USOC may authorize its contributors and suppliers to use "Olympic" designations in advertising that the "contributions, goods, or service were donated, supplied, or furnished to or for the use of, approved, selected or used by the [USOC] or United States Olympic or Pan-American team or team members."

If unauthorized users, such as defendants herein, were allowed to continue the use of "Olympic" in connection with any products or services, such misuse would conflict with USOC's exclusive right to authorize its contributors and suppliers to use "Olympic" in connection with their products and services, completely frustrating the purpose of subsection (b).

II. DEFENDANTS HAVE VIOLATED THE CALIFORNIA ANTI-DILUTION STATUTE.

California expressly has provided an action for *dilution* of a party's mark. California Business and Professions Code section 14330, provides in pertinent part:

> "Likelihood of injury to business reputation or of dilution of the distinctive quality of * * * a mark valid at common law, shall be ground for injunctive relief notwithstanding the absence of competition between the parties or the absence of confusion as to the source or service."

Thus, the mere fact of a loss of distinctiveness alone is sufficient to violate California law and to entitle the Olympic Committee to an injunction against such use (*Dall* v. *American Trial Lawyers Association* (1971) 15 Cal.App.3d 290, 92 Cal.Rptr. 220).

III. DEFENDANTS HAVE VIOLATED THE TRADEMARK LAWS OF THE UNITED STATES.

By using "Olympic," which is identical to the common law and registered "Olympic" service mark and trademarks of USOC defendant has infringed USOC's Federally registered trademarks and service marks in violation of 15 U.S.C. section 1114, and has competed unfairly with USOC in violation of 15 U.S.C. section 1125(a). USOC's registrations have become incontestable and constitute conclusive evidence of its exclusive rights to use "Olympic" as a mark for the goods or services recited therein (15 U.S.C. § 1115).

To establish liability under the Lanham Act section 49(a) (15 U.S.C. § 1125a), there need be no conscious association of defendant's goods or services directly with USOC, nor need there be any likelihood of confusion that defendants' goods or services stem directly from USOC. It is enough if the mistaken or deceptive impression is given that defendants' goods or service are in some way sponsored, approved, or associated with USOC or its activities. See, e.g., *Foxtrap, Inc.* v. *Foxtrap, Inc.* (D.C.Cir. 1982) 671 F.2d 636. Moreover, although such a showing is not necessary, if a mark was adopted for the purpose of basking in the reflected popularity of another, then a presumption is created that the name chosen will in fact give rise to such an association, or will infringe upon the other's mark (*Fleishman Distilling Corp.*, supra: *Ortho Pharmaceutical Corp.* v. *American Cyanamid Co.* (D.N.J. 1973) 361 F.Supp. 1032; *Q-Tips, Inc.* v. *Johnson & Johnson* (3 Cir. 1953) 206 F.2d 146, certiorari denied (1953) 346 U.S. 867). Defendant, for example, has announced its intention to use an "Olympic torch" to light an "Olympic flame" in a ceremony "that wildly rival the traditional Olympic Games."

Plaintiffs have used "Olympic" extensively: through media coverage of its various Olympic activities, including the upcoming Olympic Games to be held in Los Angeles during 1984; the efforts of educational groups, and filmed public

service announcements, as well as use on a wide variety of consumer products. The fame of the "Olympics" has created a "commercial magnetism" (*Mishewaka Mfg. Co.* v. *Kresge Co.* (1942) 316 U.S. 203).

However, USOC need not show that it suffered "economic disadvantage," or that the defendants' use of "Olympic" designations is "economically harmful" to the Olympic Committee. Rather the test is whether "the owner of a mark is damaged by a later use of a similar mark which places the owner's reputation beyond its control, though no loss in the business is shown" (*James Burrough Ltd.* v. *Sign of The Beefeater, Inc.* (7 Cir. 1976) 540 F.2d 266).

> "Any unauthorized use of a certain mark which would tend to connote that the prior user had in some way authorized the subsequent use of the mark infringes on the prior user's rights. It is immaterial whether the consumer might think that the prior user was manufacturing the subsequent product, whether it was being produced under the prior user's design or supervision, or whether it was being produced pursuant to some other arrangement with the prior user, so long as the subsequent use of the mark is likely to confuse the consumer and put the prior user's reputation in the marketplace beyond his control"
> (*Waples-Platter Cos.* v. *General Foods Corp.* (N.D.Tex. 1979) 439 F.Supp. 551, 574).

Thus whenever a consumer sees "Olympic" on a product or advertisement, the consumer is likely to believe that the goods are in some way connected with the Olympic Committee or its Olympic activities. The widespread knowledge and value of "Olympic" "creates the opportunity for others to ride on USOC's goodwill in the effort to attract customers to goods and services which may be thought by consumers to be in some way associated with" (*James Burrough Ltd.*, supra, 540 F.2d at 277. See also *Grotrian, Holfferich, Schultz Th. Steinweg Nachf.* v. *Steinway & Sons* (2 Cir. 1975) 523 F.2d

1331, 1342; *HHH Publishing Co., Inc.* v. *Brincat* (9 Cir 1974) 504 F.2d 713. This consumer group "includes the ignorant, the unthinking and the credulous, who, in making purchases do not stop to analyze, but are governed by appearances and general impressions" (*Florence Mfg. Co.* v. *J. C. Dowd & Co.* (2 Cir. 1910) 178 F.73). Accord, *Stork Restaurant* v. *Sahati* (9 Cir. 1948) 166 F.2d 348, 358; *AMF* v. *Skeetercraft Boats* (9 Cir. 1979) 500 F.2d 341, 355; *Lambert Pharmacal Co.* v. *Bolton Chemical Corp.* (S.D.N.Y. 1915) 219 F. 325 (Hand, J.). See also, *E. I. du Pont de Nemours & Co.* v. *Yoshida International, Inc.* (S.D.N.Y. 1975) 393 F.Supp. 502.

Any doubts or close questions should be resolved against defendants as latecomers who have acted at their own peril by resuming use of "Olympic" despite the refusal by the State of California (Miller Aff.) to allow inclusion of "Olympic" in SFAA's corporate name and the notification of misuse by USOC (e.g., *American Home Products Corp.* v. *Johnson Chemical Co* (2 Cir. 1928) 580 F.2d 102; *Fotomat* v. *Cochran, Inc.* (D.C.Kan. 1977) 437 F.Supp. 1231; *General Foods Corp.* v. *Borden Inc.* (N.D.Ill. 1976) 191 United States Patent Quarterly 674). Adoption by defendants of the "Olympic" mark with full knowledge and awareness of the Olympic Committee's exclusive rights, especially when coupled with the defendants' adoption and reliance upon an alternate mark such as "Gay Athletic Games" before resuming use of "Olympic," also establishes that defendant intended to trade upon the goodwill and "commercial magnetism" of the Olympic Committee and of the Olympics (e.g., *Stork Restaurant* v. *Sahati* (9 Cir. 1948) 166 F.2d 348; *Southland Corp.* v. *Schumbert* (S.D.Cal. 1968) 297 F.Supp. 477; *Glamorene Products Corp.* v. *Boyle-Midway, Inc.* (S.D.N.Y.1975) 188 United States Patent Quarterly 145).

IV. THERE IS NO CONSTITUTIONAL ISSUE OF FREE SPEECH OR DISCRIMINATION.

The defendants' claim of right to use "Olympic" is apparently based on a claim that the Olympic Committee is

in some fashion attempting to abridge defendants' right of free speech. However, as USOC counsel pointed out in his letter of February 22, 1982 (Kline Aff.), those issues are irrelevant, since there is *no state action* present. Nothing in the amateur Sports Act of 1978 gives the Federal government the right to exercise any form of control over any action taken by USOC, including an action to enforce the Olympic Protection provisions of the statute. Any decision by USOC to enforce those statutory rights would not be state action, and therefore could not give right to an actionable claim for the infringement of any constitutional rights (*DeFrantz* v. *United States Olympic Committee* (D.D.C. 1980) 492 F.Supp. 1181, affirmed per curiam (May 22, 1980) No. 80-1530).

Moreover, it is clear that the district court may act to enjoin defendants' *commercial* speech. See, e.g., *Dallas Cowboys Cheerleaders, Inc.* v. *Pussycat Cinema, Ltd* (2 Cir. 1979) 604 F.2d 200; *Reddy Communications, Inc.* v. *Environmental Action Foundation*) (D.D.C. 1979) 199 United States Patent Quarterly 630). In *Dallas Cowboys Cheerleaders, Inc.*, the defendant showed a movie in which that plaintiff's trademarks appeared. In response to the defendant's first amendment privilege claims, that court held:

> "Plaintiffs' trademark is in the nature of a property right, and as such it need not 'yield to the exercise of First Amendment rights under circumstances where adequate alternative avenue of communications exist.' Loyd Corp. v. Tanner, 407 U.S. 551, 567 (1972). Because there are numerous ways in which defendants may comment on 'sexuality in athletics' without infringing plaintiff's trademark, the district court did not encroach upon their first amendment rights in granting preliminary injunction.
>
> "For similar reasons, the preliminary injunction did not constitute an unconstitutional 'prior restraint.' This is not a case of government censorship, but a private

plaintiff's attempt to protect its property rights. The propriety of a preliminary injunction where such relief is sought is so clear that courts have often issued an injunction without even mentioning the first amendment. The prohibition of the Lanham Act is content neutral, and therefore does not arouse the fears that trigger the application of constitutional 'prior restraint' principles" (604 F.2d at 200) (citations omitted).

V. PRELIMINARY INJUNCTIVE RELIEF IS APPROPRIATE IN THIS CASE.

The standards applicable to the instant motion for preliminary injunctive relief are well established. Temporary restraining orders and preliminary injunctions are appropriate if a party can demonstrate that (1) the probability of succeeding on the merits at trial; (2) irreparable injury will be suffered if a preliminary injunction is not granted; (3) no substantial harm to other parties will result from a preliminary injunction; and (4) the requested relief would not harm the public interest (see, *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co., Inc.* (9 Cir. 1975) 526 F.2d 86).

(1) *Likelihood of Success.* The question of the Olympic Committee's likelihood of success on the merits has been addressed in Sections I, II and III, above.

injunction is not granted. The injury, or loss of distinctiveness, particularly through dilution, of "Olympic" cannot be measured in monetary terms. Goodwill is an inherently subjective measure which is often the most valuable asset of any corporation, as it is with USOC. Congress recognized this in expressly authorizing injunctive relief under the Federal Trademark Act and the Olympic Protection Statute, and it is under such circustances that preliminary injunctive relief is most appropriate.

(3) *There will be no substatial harm to defendant from an injunction.* Defendants had actually discon-

tinued using "Olympic" or had agreed to do so. Defendants' printed materials suggest a change from "Olympic" to "Athletic" terminology (Kline Aff.). It is only an apparently recent resumption by defendant of its unauthorized use which has prompted this action to prevent a continuation as well as expansion of such unauthorized use. Plaintiffs have no interest in preventing defendants from conducting their athletic competitions or other events. Consistent with its Congressionally mandated purpose of encouraging all Americans to participate in amateur sports (36 U.S.C. § 374), USOC's executive director conveyed to Dr. Waddell his personal wishes for the success of his endeavors, *under some other name* (Miller Aff.).

(4) *The public will benefit from issuance of an injunction.* Not only will the public not be harmed by issuance of the requested injunction, but will benefit from the prevention of any possibility of mistaken association between the parites. The Federal Trademark Act was passed expressly to prevent confusion of the public, and the Olympic Protection provision of the Amateur Sports Act was passed to enable USOC to carry out its Congressionally mandated responsibility to benefit the public through its activities. Anything which protects the interest of USOC as exclusively established by Congress, will of necessity accrue also to the benefit of the public.

VI. RELIEF.

Although the Amateur Sports Act created a cause of action independent of the Federal Trademark Laws the Olympic Protection provision affords USOC the same remedies that are available under the Trademark Laws. Consequently, in order to effectuate the purposes of the Amateur Sports Act and enable USOC to carry out its Congressional mandate, as well as to protect USOC from acts of unfair competition and dilution, plaintiffs should be awarded:

a. A permanent injuction, preventing defendants from using the term "Olympic," any "Olympic" symbol or any simulations that are confusingly similar thereto; in connection with organizing, promoting or conducting any athletic activities in the United States (15 U.S.C. § 1116);

b. An order requiring defendants to deliver up for destruction all labels, signs, prints, packages, wrappers, receptacles, and advertisements in the possession or under the control of defendants displaying "Olympic" or any "Olympic" symbol or simulations thereof and all plates, molds, matrices and other means of making the same (15 U.S.C. § 1118); and

c. Costs and attorney fees in prosecuting this action (15 U.S.C. § 1117).

USOC does not have sufficient funds fully to implement all of the developmental programs it desires to conduct, much less to undertake costly legal action against all who might violate 36 U.S.C. section 380 by misuse of "Olympic." Requiring use of USOC's funds to enforce the statute against those who might violate it diminishes the amount of funding available to implement USOC's vitally important athletic programs. These programs benefit all Americans and are a source of national pride and accomplishment. The public interest would best be served by having the costs necessary for enforcement of the Olympic Protection statute be borne by those who violate that statute, rather than by the public's contributions. Thus, in order to allow USOC to enforce the statute as contemplated by Congress, while at the same time maintaining its development programs, attorney fees should be granted liberally under the statute. Such an award of attorney fees is particularly appropriate where, as here, the violation has been wilful and with disregard for USOC's preemptive rights.

CONCLUSION

For the foregoing reasons, and each of them, plaintiffs submit that the temporary restraining order and preliminary

injunction should issue as prayed.

Dated: August 9, 1982.

(Names omitted - see J.A. 5, above.)

by Vaughn R. Walker (Signed
Attorneys for Plaintiffs,
International Olympic Committee
and United States Olympic Committee

File Date: August 9, 1982

(Names & caption omitted in printing, see J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Richard G. Kline in Support of Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction

RICHARD G. KLINE declares as follows:

1. I am one of counsel for plaintiffs herein and serve regularly as trademark counsel for plaintiff United States Olympic Committee. If sworn as a witness I could and would of my own personal knowledge competently testify under oath to the matters stated herein.

2. On or about February 2, 1982, I received by telecopier the packet of materials, true copies of which are attached hereto as Exhibit A. In response, I prepared the letter dated February 2, 1982 to Thomas F. Waddell, a true copy of which is attached hereto as Exhibit B. Thereafter, on February 16, 1982, my office received the letter dated February 12, 1982 from Mary C. Dunlap, a true copy of which is attached hereto as Exhibit C. I replied to the Dunlap letter by my letter of February 22, 1982, a true copy of which

is attached hereto as Exhibit D. Thereafter, I received no further communication from either Thomas Waddell or Mary Dunlap.

3. On June 4, 1982, I received a copy of a Bill Mandel column from the San Francisco Sunday Examiner regarding the "Gay Olympics" and as a result I initiated an investigation. I instructed a law clerk with my firm, Richard Schuett, to contact the organizers of the so-called "Gay Olympics" to obtain entry information. In response, Shuett received and gave to me the packet of material, true copies of which are attached hereto as Exhibit E. I instructed Schuett to obtain further information and Schuett informed me that he wrote the June 11, 1982 letter, a copy of which is attached hereto as Exhibit F. Schuett informed me that he received the items, copies of which are attached hereto as Exhibit G. On June 22, 1982, an article in the previous day's Washington Post concerning the "Gay Olympics" came to my attention; a true and correct copy of this article is attached hereto as Exhibit H.

4. I notified the International Olympic Committee and set in motion the steps necessary to obtain authorization to bring this action which has been brought as promptly after obtaining such authorization as practical.

5. Attached hereto in Exhibit I are true copies of U.S. Service Mark Registration No. 789, 795 and U.S. Trade and Service Mark Registration No. 968, 566. As regular trademark counsel for USOC, I am responsible for maintaining and enforcing these registered marks both of which are in full force and effect.

(Jurat omitted.)

(Exhibits omitted. Exhibits are in the Record, Docket #5.)

File Date: August 9, 1982

(Names & caption omitted in printing, see J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Affidavit of F. Don Miller in Support of Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction

F. DON MILLER, being duly sworn, deposes and says:

1. I am Executive Director of the United States Olympic Committee ("USOC") and have served in that capacity since 1973. I have personal knowledge of the matters stated herein, could and would competently testify under oath thereto if called as a witness.

2. As Executive Director, I am the chief administrative officer of USOC principally responsible for the activities of USOC's full-time staff. I am familiar with USOC's activities, purposes, files and records.

3. USOC is solely responsible for organizing, financing and controlling United States participation in the competitions, events and activities of the International Olympic Games and the Pan American Games. The bulk of funds used to support the activities of the USOC are obtained through private donations and corporate contributors that are authorized to use the Olympic trade names, trademarks, symbols, insignia and emblems of USOC and Olympic symbol of the International Olympic Committee ("IOC"). USOC will raise approximately $40 million during the present four year quadrennium by authorizing the use of "Olympic" and USOC's trademarks, symbols, insignia and emblems. "Olympic" is the principal identification of USOC,

serving as the distinctive feature of its trade name and as a registered trademark and service mark for various goods and also services. In addition to authorizing use of "Olympic" in return for contributions and other consideration, USOC also has authorized use of "Olympic" to organizations which sponsor athletic competitions and events for handicapped persons (i.e., "Special Olympics") and for youth (i.e. "Junior Olympics" and "Explorer Olympics"). Except for these competitions and events, USOC has not otherwise authorized use of "Olympic" for use in connection with athletic competitions and events. USOC maintains a policy of objecting to any use of "Olympic" in connection with athletic competitions and events that USOC has not authorized and has, without exception, objected to any use of "Olympic" as a trade name in connection with athletic competitions and events coming to USOC's attention or knowledge.

4. In December 1981, I was informed that the Assistant Communications Director of USOC, Michael Moran, while in San Francisco, initially saw some use of "Gay Olympic Games" in connection with athletic competitions or events scheduled to begin in that city during the summer, 1982. I was further informed that the group sponsoring the "Gay Olympic Games" had initiated a publication "Gay Olympics" and had conducted a variety of promotional activities, including fund raising events. On December 23, 1981, I sent to Gay Olympic Games, in care of an address obtained by Mr. Moran, a letter requesting that use of "Olympic" in connection with these athletic competitions or events be discontinued. A true and correct copy of my December 23, 1981 letter is attached hereto as *Exhibit A*.

5. On or about January 4, 1982 I received a letter dated December 26, 1981, bearing the name and signature of Thomas F. Waddell. I am acquainted with a man of that name who competed in the 1968 Olympic Games at Mexico City. A true and correct copy of Dr. Waddell's December 26, 1981 letter is attached hereto as *Exhibit B*. Enclosed with that letter were the documents attached hereto as *Exhibit C*. On

January 6, 1982, I sent a letter of that date in response to Dr. Waddell's December 26, 1981 letter. A true and correct copy of my January 6, 1982 letter is attached hereto as *Exhibit D.*

6. On or about January 13, 14 or 15, 1982, I received a telephone call from Dr. Waddell who confirmed that he had in fact participated in the 1968 Olympic games. Dr. Waddell again requested that USOC authorize him and San Francisco Arts & Athletics ("SFAA") to use "Olympic" in connection with the 1982 summer athletic competitions and events scheduled in San Francisco. I reiterated the position I had taken in my January 6, 1982 letter. I told Dr. Waddell that the principal source of financial support for United States participation in the Olympic Games is authorization to use "Olympic" and other trademarks, symbols, emblems and insignia of USOC and that his group's use of "Olympic" in connection with athletic competitions or events in San Francisco would seriously impair USOC's fund raising activities. There is no restriction by the USOC or the IOC against participation in the Olympic Games by homosexuals and I am confident that homosexuals have participated in past Olympic Games. I further explained that USOC's objection to his group's use of "Olympic" did not reflect animosity or bias against gay people, but only that USOC objects to any group which attempts unauthorized use of "Olympic" in connection with athletic competitions or events. Dr. Waddell said that he understood USOC's position and that he and his group would cease use of "Olympic" in connection with the athletic competitions and events which he and his group planned. Thereafter, I received a letter of January 18, 1982 from Dr. Waddell acknowledging his agreement to cease use of "Olympic", a copy of which is attached hereto as *Exhibit E.* I acknowledged receipt of this letter by my letter of January 27, 1982, a true and correct copy of which is attached hereto as *Exhibit F.*

7. As a result of the foregoing, I assumed that "Olympic" would not be used in connection with the competitions and events SFAA and Dr. Waddell planned to organize, promote

and control. However, sometime after January 27, 1982 a letter was received from Dr. Waddell stating that he had been advised that he need not have agreed to cease use of "Olympic" and asking that the USOC change its position. He did, however, agree to continue to avoid the use of "Olympic" pending a resolution. That letter was referred to the USOC Counselor, who declined to modify the agreement. Copies of these letters are attached as *Exhibit G and H.*

8. I did learn in February 1982 that a lawyer named Mary Dunlap who purported to represent SFAA had written USOC that SFAA did not concede that USOC had exclusive right to "Olympic" in connection with athletic competitions or events. USOC did not, however, receive any information after my telephone conversation and correspondence with Dr. Waddell that SFAA had continued to use "Olympic." Consequently, USOC took no action. I did instruct members of the USOC staff to keep their eyes open for any resumed use of "Olympic" by SFAA. USOC received no such indication until a newspaper report was received and forwarded to the USOC Counselor in June 1982. A true and correct copy of this report is attached as *Exhibit I.* I instructed USOC staff and legal counsel to investigate.

9. As a result of this investigation further evidence of SFAA's resuming use of "Olympic" came to light. During the week of June 28, 1982, I brought the matter to the attention of the International Olympic Committee. At the first opportunity, I brought this matter to the attention of USOC's Administrative Committee on July 23, 1982 and obtained authorization for initiating legal action.

(Jurat omitted.)

(Exhibits omitted. Exhibits are in Record, Docket #6.)

File Date: August 9, 1982

(Names & caption omitted in printing, see J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Affidavit of David Preston in Support of Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction

Affidavit of David M. Preston

STATE OF CALIFORNIA,
City and County of San Francisco. ss.

DAVID M. PRESTON, being duly sworn, deposes and says:

1. I am Press Liason Officer of the United States Olympic Committee ("USOC"), have personal knowledge of the matters stated herein, could and would competently testify under oath thereto if called as a witness.

2. Until April 1982, my principal occupation was Sports Information Director for the University of San Francisco. I am now self-employed in the field of sports marketing. Also since 1980 I have served as Press Liaison Officer for USOC. This is an appointive position but pays no salary or other compensation.

3. In December 1981, Mike Moran, Assistant Communications Director for USOC, informed me that a group in San Francisco was planning a series of athletic competitions and events called "Gay Olympics." Mr. Moran instructed me to keep my eyes and ears open for any information regarding these competitions or events and particularly any use of "Olympic" in that connection. Thereafter, nothing concerning these competitions or events came to my attention until

June 1982, when I received a telephone call from Mr. Moran who referred to an article in a San Francisco newspaper which stated that athletic competitions called the "Gay Olympics" were going to go forward in late August 1982. Mr. Moran asked me to find out what I could about these competitions.

4. On June 7, 1982, I received a call from Ron Rowan, General Counsel of USOC, who asked me to find out what I could about the "Gay Olympics" and, in particular, to find out if stationery, flyers or other printed material were being circulated using "Gay Olympics." On that same day I called Pacific Telephone's directory information service and asked if there was a telephone number for "Gay Olympics." I was told that there was such a number and that it was 861-8282. I called that number which was answered by a male voice stating "Gay Olympics." I asked "What is your parent company?" The person replied that it was called San Francisco Arts & Athletics Corporation and was a nonprofit group. The man stated that his group planned to present athletic games beginning August 1982 although not all of the locations for these competitions had yet been determined. Approximately one and one-half hours after this conversation, I again telephoned 861-8282 which again was answered by a male voice stating "Gay Olympic Games." I identified myself and said that I did sports marketing and promotions and wanted to know who to contact regarding the "Gay Olympics." The male voice on the other end of the telephone said that everyone worked without a salary but suggested I write Dr. Tom Waddell at Post Office Box 14874, San Francisco, 94114; the person to whom I talked said that Waddell was executive director of the Gay Olympics.

5. A couple of days or so after these telephone conversations I wrote and mailed a letter addressed to Tom Waddell at the address I had been given. The letter asked for information on the activities of San Francisco Arts and Athletics and its plans for the Gay Olympic Games. I stated that I was interested in making a proposal for marketing

activities in connection with the Gay Olympic Games and inquired whether Dr. Waddell felt my services might be of some value.

6. On June 21, 1982, I received a reply to my June 10 letter to Dr. Waddell. The envelope contained stationery with a logo and one or more of the documents bore the title "Gay Olympic Games." Nothing in the envelope responded to the questions I had put in my June 10 letter but gave two telephone numbers at which I could call Tom Waddell for answers to any questions that I might have. I sent the materials that I received on June 21, 1982, to Ron Rowan at USOC together with a newspaper article concerning the Gay Olympic Games which I also saw at about this time. On July 29, 1982, I saw a column by Art Rosenbaum in the San Francisco Chronicle regarding the "Gay Olympics"; a true and correct copy of this article is attached hereas to an exhibit.

(Jurat omitted.)

(Exhibits omitted. Exhibits are in Record, Docket #7.)

File Date: August 9, 1982

INTERNATIONAL OLYMPIC COMMITTEE, a corporation organized and existing under the laws of Switzerland; UNITED STATES OLYMPIC COMMITTEE, a corporation organized and existing under the laws of the United States of America,

Plaintiffs,

vs.

SAN FRANCISCO ARTS & ATHLETICS, a California corporation; THOMAS F. WADDELL,

Defendants.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

C-82-4183 RFP

Temporary Restraining Order and Order To Show Cause

This matter having come on for consideration on the application of plaintiffs for a temporary restraining order and order to show cause why a preliminary injunction should not be issued; and it appearing that defendants have violated the Amateur Sports Act of 1978 and other provisions of law by unauthorized use of "Olympic" and plaintiffs' other names, marks, symbols, emblems and ensignia, and combinations and simulations, thereof and that said law violations have caused and will continue to cause plaintiffs to suffer irreparable loss, damage and injury:

It is hereby *ORDERED* that:

1. Pending the hearing on the order to show cause as set

out below, defendants, their employees, agents, officers, attorneys and representatives, all persons participating with or acting in concert with them, and each of them, shall immediately cease, desist and refrain from further use of "Olympic" or "Olympiad" or any confusingly similar word, term, name, trade name or any symbol, emblem, trademark or ensignia of the International Olympic Committee or the United States Olympic Committee, or any combinations or simulations thereof, for the purpose of trade, to induce the sale of any goods or services, or in connection with any advertising, promotion, publicity or production of any theatrical exhibition, athletic performance, competition or event.

2. Defendants shall appear before this Court at 9:30 a.m., or as soon therafter as the matter may be heard, on August 19, 1982, to show cause, if any there be, why they should not be enjoined as prayed for in the complaint herein, until the trial of this action.

It is further *ORDERED* that a copy of the complaint, memorandum of points and authorities, supporting affidavits and a copy of this order be served on defendants no later than August 10, 1982; and that any opposing papers be served and filed by defendants no later than August 16, 1982.

This order becomes effective upon the filing by plaintiff of a bond in the amount of $1000.

Dated: August 9, 1982.

Samuel Conti (signed)
United States District Judge

File Date: August 9, 1982

(Names & caption omitted in printing, see J.A. 5, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Hearing on T.R.O.: Reporter's Transcript
Reported by: Betti A. Ray, C.S.R.

The Clerk: *Civil 82-4183 RFP, International Olympic Committee* versus *San Francisco Arts and Athletics, Et Al;* plaintiff's application for a temporary restraining order.

Counsel, step forward and make your appearance known for the record.

Mr. Walker: Your Honor, I am Vaughn Walker representing The International Olympic Committee and The United States Olympic Committee.

Ms. Dunlap: Mary Dunlap for the defendants.

Good afternoon, Your Honor.

The Court: Good afternoon.

Anybody else?

Mr. Walker: My sssociate, Denise Amantea, Your Honor, and Richard Kline of the Washington, D.C. Bar. He is regular counsel for the United States Olympic Committee.

Ms. Dunlap: And Dr. Thomas Waddell, who is one of the named defendants in the action, Your Honor.

Mr. Walker: Your Honor, if I may proceed, we are seeking a temporary restraining order.

The Court: Excuse me just for one moment.

(Pause in Proceedings)

The Court: Proceed.

Mr. Walker: Thank you, Your Honor.

We are seeking a restraining order in connection with

***Mr. Walker** (cont.):* athletic competitions which are scheduled, to our knowledge, to commence in San Francisco on the 28th of August. There are some preliminary activities which apparently are going to commence before that time; an Olympic torch is to be carried across the country to these competitions and I believe that they are to arrive in San Francisco—or excuse me—the torch is to arrive in San Francisco on the 22nd of August.

The 1984 Summer Olympics Games, Your Honor, are to be held in Los Angeles. The International Olympic Committee is the party solely charged with the responsibility for organizing these events.

The United States Olympic Committee is charged, under a statute of Congress, with the responsibility of organizing all participation of the United States in the Olympic Games.

As part of that effort, Congress has afforded to the United States Olympic Committee the sole right to use "Olympic" and the Olympic Symbol, which are three interlocked circular rings, and the other emblems and insignia and marks, trademarks, trade names of the Olympic Games. All of that material is set forth in one or the other of the affidavits which we have submitted including the registered trademarks, which are attached to Mr. Kline's declaration, which we filed with our application.

The first indication that my clients had that the defendants were intending to conduct some international athletic competitions and events occurred in December 1981 when a publicity director for the United States Olympic Committee in San Francisco picked up some information about these activities.

Consistent with the U.S. Olympic Committee's regular policy, a formal letter was sent out to the defendants to discover the name of the organization which was sponsoring these activities and a request to cease and desist from use of "Olympic" was sent to San Francisco Arts and Athletics.

We received a response. We learned, as a result, that this organization was advised, when it sought to incorporate in

Mr. Walker (cont.): California, that it was advised by the Secretary of State's Office that the term "Olympic" was the exclusive right of the U.S. Olympic Committee to use and apparently the defendants were refused the corporate designation "Olympic" for their organization.

In any event, we later learned that the defendant, Dr. Waddell, was the chief person organizing these activities. He is, himself, a former Olympian, we understand; he participated in the 1968 Games in Mexico City.

He was requested by the Executive Director of the United States Olympic Committee to cease and desist from any use of "Olympic" and U.S.O.C. trademarks, trade names, emblems and insignia.

There was correspondence back and forth in January and February of 1982. The result of it was an agreement, or an understanding, as we have it, by the defendants that they would not use "Olympic". That is reflected in a letter sent by Dr. Waddell, which is attached to the Miller Affidavit. It is Exhibit E. Your Honor, a letter dated January 18, 1982 from Tom Waddell to Colonel Miller in which Mr. Waddell states, "We have, as an interim measure, blocked out the term "Olympic" and in all subsequent printed materials, will substitute the term "Athletic".

That was further amplified in a subsequent letter to Mr. Kline, I believe it was, which is attached to Mr. Kline's declaration as Exhibit A.

Mr. Waddell wrote, in a letter dated January 26, 1982:

"Until this controversy can be definitively resolved, we of the San Francisco Arts and Athletics, Incorporated, are making every reasonable effort temporarily to suspend and avoid use of the term "Olympic" in our non-profit organization's activities."

And there is evidence, Your Honor, that in fact, the defendants ceased use of the term "Olympic".

Their lawyer, Ms. Dunlap, subsequently followed up with a letter stating that she disagreed with the U.S. Olympic Committee's claim to exclusive right of use of "Olympic".

***Mr. Walker** (cont.):* The letter suggested the possibility of coming into court for declaratory relief. But nothing happened.

Nothing happened, Your Honor, until around the first of June the U.S. Olympic Committee learned, by receiving a newspaper article from the San Francisco Sunday Examiner that apparently, this group had resumed use of "Olympic".

Subsequently, an investigation followed, as is set forth in Mr. Kline's affidavit. Mr. Kline and officials of the International Olympic Committee took every step thereafter to make sure that both parties were fully coordinated and the decision to go forward and challenge the use by the defendants of the term "Olympic" and the U.S. Olympic Committee's exclusive trademarks was then brought before the court today.

Let me say, Your Honor, that there are several reasons why both the International Olympic Committee and the U.S.O.C. believe this matter is of great importance and why we are here on a temporary restraining order request.

The bulk of the funds that support United States participation in the Olympic Games come from private contributions and from corporate contributions, which are pursuant to authorizations by the U.S.O.C. for use of the term "Olympic" and/or the exclusive trademarks and trade names of the U.S. Olympics Committee. In other words, by licensing the trademarks and emblems and insignia, most of the money used to support American participation in the Olympic Games is raised.

In addition, what we have here is an infringement of these marks and names, not just by a neighborhood group getting together and calling some sort of contest like the Elm Street Olympics. We have here a group which is intending to sponsor athletic contests and competitions and events which resemble the Olympic Games.

Apparently—we understand—that there are participants coming from other countries. We understand that the entry into these contests is not limited to homosexual people, but

***Mr. Walker** (cont.):* anyone may come and participate.

In a very real sense, these events are competing with the Olympic Games to which the U.S.O.C. and the International Olympic Committee have exclusive right to govern, control and conduct. And because of the fact that the Olympic Games are going to be conducted in California in 1984, these contests of the defendant, we believe, are a very serious infringement of the right to control the Olympic Games as well as, of course, infringement of the exclusive marks and trademarks and trade names of the I.O.C. and the U.S.O.C.

Further, we had what we regard as an aggravated case by virtue of the recognition by the defendants of our exclusive right to use these terms and their agreement earlier, and statements to us that they were going to cease and desist and apparently have gone back on that understanding and agreement with us.

We believe that this matter should come to the court for a resolution on a preliminary injunction as soon as possible and in the meantime, we believe it's essential that the defendants be restrained from using our marks for "Olympic" in any way.

The Court: Okay.

Ms. Dunlap: Your Honor, I am pleased to say I agree with one thing that counsel said and that's that this matter should be set down for a hearing on the preliminary injunction as soon as possible.

I am informed by my clients that the Gay Olympic Games are to commence on the 28th of August, so I think it's in the interests of all the parties that this matter be resolved in legal terms as soon as possible.

Let me address the arguments counsel has made in regards to the purported likelihood of the plaintiffs' success on the merits and then turn to some of the other elements of the test for such preliminary or temporary relief as is sought today with the purpose, of course, of convincing the court that a temporary restraining order is not proper or appropriate in the case.

Ms. Dunlap *(cont.)*: Defendants' memorandum of points and authorities, which I received at or about 3:00 o'clock this afternoon, and which I have read, does not cite a case upon which we rely in significant part for our position that these defendants in this case have a perfect right to do what they have done with the term, "Olympic".

Counsel's argument also mentioned three Olympic Rings as a protected part of the trademark. The court will find, in a resort to the statute, Title 36 U.S. Code Section 379 or 380 that it is five rings that are protected.

It is correct that some of the Gay Olympic Games uses a three rings insignia. It is not within the symbolism protected as def—plaintiffs' counsel sought to mention.

But more at the heart of the matter is the case upon which we primarily rely for our position that this court should not grant a temporary restraining order for two primary reasons.

The first is that the purposes of the statutes upon which the plaintiffs rely have been found to be primarily a congressional intent to prevent commercial competition with the U.S. Olympic Committee.

The plaintiff, as is established by the defendants' exhibit, and I want to give the court the exhibit number, I believe it's exhibit—exhibit—I beg the court's indulgence for my unfamiliarity with these exhibit numbers is showing.

There is a letter or a document from the Gay Olympic Games to the law clerk who conducted this purported investigation of this entity's activity and in that letter or publication, it is recited that the defendant San Francisco Arts and Athletics is a non-profit organization.

The Court: That's from whom to whom?

Ms. Dunlap: That's from the San Francisco Arts and Athletics Group to—in correspondence or in communication with this law clerk who, apparently, corresponded representing his need for some information from the group. But I will find the document here.

The Court: That's not the one from Wadell is it, to Miller?

Ms. Dunlap: No, Your Honor although that document may well mention that they are a non-profit organization. There is no question that this organization is incorporated as a non-profit entity under California law. But there is a document among the defendants' documents that establishes that and I want that to be—

The Court: What are they incorporated as?

Ms. Dunlap: As a non-profit corporation.

The Court: What's the name?

Ms. Dunlap: San Francisco Arts and Athletics, Your Honor, and they are sued as a party defendant California corporation.

But I wanted to find this document so there will be no ambiguity as to the nature of this defendant. That's at the heart of the matter, Your Honor, because of the purpose of preventing and restraining commercial competition with the U.S. Olympic Committee.

The case upon which we rely, Your Honor, for both that interpretation of the statute and for purposes of our argument that the plaintiffs' activities are not banned nor prohibited by the laws—that the defendants' activities are not banned or prohibited by the laws the plantiffs cite is "Stop The Olympic Prison versus U.S. Olympic Committee". That's at 489 Federal Supplement, Page 1112. It's a Southern District of New York Opinion of 1980.

And let me briefly complete the terms of my argument, then I will find the court the reference about the defendant, but I want there to be no ambiguity of record that we are talking about a non-profit corporation here and about non-profit activity.

It was the thrust of plaintiffs' counsel's argument that Defendant U.S.—Plaintiff U.S. Olympic Committee had been damaged in, and the papers suggest this, although they certainly don't prove it, had been damaged by the fact that the use of the word "Olympic" is associated with an athletic event.

***Ms. Dunlap** (cont.):* As a practical matter, the use of the word "Olympic" in this case by a non-profit organization has not been shown, and we contend will not be shown, to in any way infringe, impede, intrude or restrain or limit the ability of the U.S. Olympic Committee to do all of its both commercial and non-commercial activities in furtherance of the Olympic Games and as a practical matter, the non-profit status of this defendant is at the crux of our position that the statutes upon which the plaintiffs rely are entirely distinguishable and inapplicable to the defendants in this case.

So on the part of the first prong for . . test of the propriety of temporary relief, we submit that there is no likelihood of the success of these plaintiffs on the merits because of the inapplicability of the statutes upon which they rely.

There is a further and perhaps more serious reason that this court should not conclude that they are likely to succeed on the merits, and that is that by their effort to use the courts to restrain these defendants from a non-commercial use of a word, "Olympic", it is our position that they are infringing upon the first amendment rights of speech and association, not only of the named defendants, but of all persons who might choose to participate in these non-profit and non-commercial activities.

The state action element here consists in two parts, and I notice, in the memorandum of the plaintiffs that the suggestion was made that there is no state action.

In this case, we contend that there is state action. One, by the fact that any injunction by this court establishes an involvement by the government and an enforcement by the government of a restraint on speech and although the U.S. Olympic Committee acting independently might or might not accomplish such a restraint under color of law, the courts having issued an order would certainly accomplish the requisite state action.

In that regard, the case cited by the plaintiffs on that point is distinguishable.

Ms. Dunlap *(cont.)*: The facts as presented to this court by plaintiffs' counsel are quite different from those in my record and I want to point out those parts of the differences that are significant.

Counsel, it seems to me, seeks to suggest to this court the plaintiffs were surprised by and have been taken aback by the defendant's use of the term "Olympic".

Your Honor's review of the correspondence in this case will unambiguously establish that the plaintiffs in this case were apprised by my letter that my clients had no intention to permanently restrain themselves from the use of the word, "Olympic" for any reason because they claimed a legal right to use it. That letter was written in February. We are here in August. There can be no surprise. There can be no claim of having been taken aback that is genuine on the face of this record where the plaintiffs are concerned. They say nothing happened between February and the present time. That is because they chose to forego the bringing of this litigation until this date, a few weeks prior to the commencement of the Gay Olympic Games. So the timing of the suit has been in the defendants' hands for all these months and the fact that they have chosen to abstain and to wait some six months from the time when they were apprised that the word "Olympic" would be used suggests that their claim of irreparable injury has to be weighed and measured by this court against the reality that if the injury is so irreparable, the defendants did nothing to repair it for a period of almost six months.

They claim a further injury at least by way of characterization, although once again there is no evidence of record, there is no affidavit of record that supports this. They make the argument that their good will has somehow been impaired or infringed by the activities of these defendants and they state, in the memorandum of points and authorities at page 14, that good will is inherently subjective. True it is, but the assumption of that argument is that the good will of the U.S. Olympic Committee has somehow been, or might

Ms. Dunlap *(cont.)*: somehow be, jeopardized by the activities of these defendants. Nothing in the record supports that.

The defendants make the argument—I am sorry—the plaintiffs make the argument at Page 2 of Mr. Walker's declaration that because there has been substantial media attention, the plaintiffs have somehow been especially harmed by the use of the word "Olympic" in context of the Gay Olympic Games. The greatest problem, the greatest trouble with that argument is that if this court were to take it to its logical conclusion, then any celebrated activity in which the media paid attention would, for that reason, be subject to restraint.

I submit to the court that the first amendment stands foursquare against the kind of reasoning about the media and the kind of inferential claim of harm that the plaintiffs here seek to advance.

I think that along with the fact the defendants have not demonstrated injury that is requisite to a showing required for purposes of any temporary relief is the fact that the plaintiffs will be injured if this court issues an injunction. Not only will they be injured in the practical sense of having to excise and remove this term from all of their materials and promotional and publication literature, but also and more profoundly, the defendants and every other individual who claims a non-commercial, non-trademark related right to use the term "Olympic", which we also submit is a generic work of long standing non-commercial history, the first amendment rights of all of those people will have been invaded, not simply by these plaintiffs' position, but by this court's making of an order based upon that position.

For that reason, we rely substantially not on the merits of the decision in the "STOP" case, but on the court's discussion there in dictum of the problems that would arise from an injunction aimed at the non-commercial and political and non-trade related use of a term.

Finally, your honor, I would make something, which I

Ms. Dunlap *(cont.)*: have to characterize as being in the way of an offer of proof. Obviously, the short notice in this case precludes me, even if the court were willing, from putting on witnesses or presenting affidavits.

I am informed by my client, and we will prove at whatever stage the court is able to hear the evidence, that there are other Olympics conducted widely across the United States by groups such as police organizations, the Armenian National Origin Group, Crab Cookers, Waiters, Diaperers and a whole variety of different people who set up athletic events and theatrical performances using the term "Olympic" who, in many instances, have received letters of so-called warning from Don Mitchell and others of the U.S. Olympic Committee, but who, in no instance, have ever been brought as parties defendant to litigation, and we submit in that regard, that as well as the first amendment defenses that we intend to prove, and to provide in response to this litigation, there is a very substantial equal protection question.

If the plaintiffs are permitted to proceed against a particular group for discriminatory reasons and to use the good offices of the Federal Court to enforce that discrimination, it is our position then that not only the first amendment rights of these plaintiffs and the public will be violated, but also that there is a significant equal protection guarantee question.

The final test for purposes of any temporary relief is where there is any harm to the public that arises from the making of a temporary restraining order or preliminary injunction, and I would submit that there are two distinct bases for a conclusion that there is harm to the public if the application for temporary restraining order were to be granted here.

First of all, as I earlier submitted, the plaintiffs' entire case is posited upon what we believe to be a misinterpretation of federal law and of the purposes of Congress in the enactment of the laws upon which plaintiffs rely.

Congress did not intend, and we believe the "STOP" case part establishes this, as well as some cases cited at footnote 22

Ms. Dunlap *(cont.)*: of page 1119 of that opinion. Congress did not intend, by the enactment of the laws upon which plaintiffs rely to reach out and protect and prevent every non-commercial political, social or other use of the term "Olympic". Had they done so, and this is the second ground for harm to the public, such an act on the part of Congress would indeed, and should indeed, undergo the most careful scrutiny in light of its profound effect upon first amendment rights.

For all of those reasons, Your Honor, we believe that the plaintiffs' application for a temporary restraining order ought to be denied by this court and that this court ought to in whatever way the court can, to set the matter of a motion for preliminary injunction for some time within the next several days or week or so so that the matter may be resolved in behalf of all the parties.

Does Your Honor have questions?

The Court: No.

Ms. Dunlap: Thank you.

Mr. Walker: Your Honor, the first point raised by Ms. Dunbar (sic) was that the statutes upon which we rely are not intended to prevent commercial—or excuse me—are intended to prevent commercial competition with the Olympic Games and because her client is a non-commercial corporation, the statutes do not apply.

Your Honor, I would like to direct your attention to the statutes themselves and to them which are quoted in our memorandum on Page 2. This is Section 380, Subsection A, and the Court will note that the statute provides that without the consent of United States Olympic Committee, any person who uses, for the purpose of trade to induce the sale of any goods or services or to promote any theatrical competition, athletic performance or competition, and that is exactly what this organization is planning to do and is doing. And it makes no difference that these defendants are not going to earn a profit from that activity.

Ms. Dunbar (sic) said that she was not relying on the holding of the "STOP" case and well she should not because

***Mr. Walker** (cont.):* that case provides her no comfort whatever. What the parties there, who were using "Olympic" in their names, were doing were to try to stop a state plan to convert the athletic or athletes' dormatories and housing facilities constructed for the late classic Olympics of a few years back, to have those facilities converted subsequent to the Olympics to a prison. These were people in the community and they didn't like the idea of having a prison in their area and so they formed an organization, "Stop the Olympic Prison". That is not the kind of use of "Olympic" in connection with an athletic competition or competition which is reached by section 380, and the court was very clear in a decision by Judge Canella (phonetic), that had the infringing party or allegedly infringing parties been conducting an activity of the kind the United States Olympic Committee engages in, namely, athletic performances and competitions, his ruling would have been quite different.

With regard to Ms. Dunbar's (sic) First Amendment claim, we think that's easily answered, Your Honor. In fact, we consigned it to a footnote in our memorandum.

It's quite clear that certain uses of "Olympic", for example in news stories, are not affected by Section 380, and we don't make any such claim.

Under the logic presented by Ms. Dunbar (sic), if the First Amendment foreclosed our action here, there would be no right of any copyright or trademark claim, but of course those are claims which are provided and the first amendment does not stand in the way at all of those claims.

And finally, let me address Ms. Dunbar's (sic) public interest argument. She claims that we are not going to suffer any harm and that her clients are going to suffer harm.

Your Honor, we are harmed. First because this is an activity which directly competes with the Olympic Games, an athletic competition and event. The fact that it is identified with homosexuals and the homosexual community makes that harm to us even graver.

In Mr. Miller's affidavit, he points out at the bottom of

***Mr. Walker** (cont.):* Page 3 that there is no restriction by the United States Olympic Committee or the International Olympic Committee against participation in the Olympic Games by homosexuals and he is confident that homosexuals have participated.

The U.S.O.C. is prevented by statute from discriminating on the basis of race, creed, color or what-have-you. The fact that the Olympics are open to everyone, gay or straight, suggests that having this group set up a series of athletic competitions and calling them "The Gay Olympics" suggests very strongly that they have to do it because the Olympics themselves are not available to gay people, but that clearly is not true. So we are harmed, our reputation is harmed by the mere use of this term, and we think that it should warrant a temporary injunction by Your Honor, a temporary restraining order.

The Court: All right. Is the matter submitted?

Ms. Dunlap: Yes, Your Honor.

Mr. Walker: I have the original proposed temporary restraining order. Should I submit it to the court, Your Honor?

The Court: I have one here.

Well, in reviewing this matter, this, of course, is a temporary restraining order. However, it seems to the court, in reviewing the criteria that one has to use in granting such a motion, one has to look at, one of the criteria is the likelihood of success on the merits and the statute, counsel, is clear. It says that the "Corporation may acquire all or all assets of the existing known as the—well, it goes on to say, in 380, "without the consent of the Corporation", which is the Olympic Committee, "any person who uses for the purpose of trade to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition", and it goes on four, "the words "Olympic", "Olympiad", "Citius Altius Fortius or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the corporation or any Olympic activity."

***The Court** (cont.):* And Subsection (C) below, skip a few of the other sections, it says:

> "The Corporation shall have exclusive right to use the name 'United States Olympic Committee': the symbol described in Subsection (a) (1) of this Section; the emblem described in Subsection (a) (2) of this Section; and the words 'Olympic', 'Olympiad', 'Citius Altius Fortius', or any combination thereof subject to the preexisting rights described in Subsection (a) of this Section."

So it would appear, from the statute of Congress, that Congress enacted, that the Olympic Committee possesses the exclusive right to use the word "Olympic" and "Olympiad" and the various other names, designations, symbols and insignia, "Olympic Games or combinations or assimulations thereof in the United States for trade or theatrical performances, etc., so it seems to me that this is quite clear now absent declaring this section unconstitutional, which I am not inclined to do at this particular juncture.

Ms. Dunlap: It is a little early for that.

The Court: I am going to have to grant the motion for preliminary injunction. However, I would like to give you as early a date as I can, but this is not my case, it's Judge Peckham's case and therefore, I—if you want, the earliest date I can give you is probably August 19th, and I would suggest there then, if this meets with everybody's approval, that—let's see, the Complaint and Memorandum of Points and Authorities and Supporting Affidavits be served no later than August 10th, which is tomorrow, and that any opposing papers to be served and filed by the defendants be no later than August 16th and then the hearing will be on August 19th at 9:30.

Ms. Dunlap: Your Honor, may I make one observation before you sign that order?

The Court: Okay.

Ms. Dunlap: Thank you kindly. Thank you for indulging me.

The section of the Statute that Your Honor just read was

***The Court** (cont.):* interpreted by Judge Canella in the "STOP" case and he said, and I quote, "Notwithstanding the broad wording of Subsection C, it cannot be interpreted to mean that only the defendants' Licensees may use the word 'Olympic', and the enumerated symbols for any purpose whatsoever."

Your Honor, for purposes of interpretation of the statute, we do rely on the holding in the "STOP" case as interpretive of the position which supports the defendants in this case. For that reason, a naked reading of the Statute cannot decide the question whether these plaintiffs are likely to succeed, whether there is a likelihood of success on the merits of their claim.

The Court: With all respect to my brother, if he were joined by two other judges and they were sitting on the appellate, Court of Appeals, I might be inclined to agree, but at this stage, I cannot.

Also, what do you suggest as a bond?

Mr. Walker: A thousand dollars, Your Honor.

Ms. Dunlap: Let me consult with my client about what the financial posture is of the non-profit organization.

Your Honor, I am informed by my client, Dr. Waddell, that at present, as of this date, San Francisco Arts and Athletics has expended approximately in the neighborhood of $60,000 to put on the Gay Olympic Games in late August. I think a bond of a thousand dollars may be cutting it a little close in terms of any remuneration that might eventually be due to the defendants for infringement of their rights.

The Court: Well, I think probably, I think a bond is sufficient even if your damages would be more than that: I am sure that the Olympic Committee is good for it. If not, they can pay it in tickets, huh, for the games.

So I will set the bond at a thousand dollars and sign this. The Court will execute the restraining order as submitted by Counsel.

Fine. Thank you, Counsel.

(Reporter's certificate omitted.)

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Supplemental Declaration of Richard G. Kline in Support of Order to Show Cause Re Preliminary Injunction

RICHARD G. KLINE declares as follows:

1. In addition to serving as one of counsel for plaintiffs in this action, I am Counselor as well as trademark counsel for plaintiff United States Olympic Committee. If sworn as a witness, I could and would of my own personal knowledge competently testify under oath to the matters stated herein.

2. Pursuant to a policy that was established prior to enactment of the Amateur Sports Act of 1978, the United States Olympic Committee has continued to actively challenge registration of marks containing the word "OLYMPIC" or "OLYMPICS."

3. Among the judgments that have been entered sustaining these oppositions to registrations, the United States Olympic Committee succeeded not only in preventing registration of GOLDEN AGE OLYMPICS as a service mark for conducting athletic contests for senior citizens, but also obtained a written commitment to discontinue all use of "OLYMPICS" as a trade name or component of any mark. True copies of the judgment that was entered by the Trademark Trial and Appeal Board of the U.S. Patent and Trademark Office, the Settlement Agreement and the notification instituting Opposition No. 62,426 are appended hereto as Kline Supplemental Declaration Exhibit J.

4. In addition, the U.S. Olympic Committee has successfully enforced its rights to prevent the unauthorized use of "OLYMPIC" as exemplified by the following civil actions

that were brought after enactment of the Amateur Sports Act of 1978:

A. *United States Olympic Committee* v. *Olympic Trails Bus Company, Inc.*, Civil Action No. 80-2062 (D.C. Cir. 1980). A true copy of the Consent Judgment and Permanent Injunction against using or displaying "OLYMPIC" as a trademark, service mark or trade name is appended hereto as Kline Supplemental Exhibit K.

B. *National Amateur Sports Foundation* v. *United States Olympic Committee*, Civil Action No. 80-496 (D.C. Cir. 1980). A true copy of the Consent Decree prohibiting the use of "OLYMPIC" in connection with the solicitation of funds or obtaining contributions is appended hereto as Kline Supplement Declaration Exhibit L.

C. *United States Olympic Committee* v. *David Shoe Company, Inc., et al.*, Civil Action No. C-1-82-596 (S.D. Ohio 1982). A true copy of the Opinion and Order Granting Plantiffs' Motion For A Preliminary Injunction prohibiting use of "OLYMPIC" for the purpose of trade or for any other purpose under 36 U.S.C. § 380 is appended hereto as Kline Supplemental Declaration Exhibit M.

(Jurat omitted.)

(Exhibits omitted. Exhibits are in Record, Docket #11.)

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Vaughn R. Walker in Support of Application for Preliminary Injunction

VAUGHN R. WALKER, declares as follows:

1. I am one of counsel for plaintiffs herein. If sworn as a witness I could and would under oath testify of my own personal knowledge to the matters stated herein.

2. On August 9, 1982, I appeared in this Court on behalf of plaintiffs. Before the hearing, a person who identified himself as a news reporter gave me a packet of materials which, he said, had been distributed to the media by the organizers of the so-called "Gay Olympic Games." Attached hereto as page one of Exhibit A is a true copy of the front of the packet; page two of Exhibit A is a copy of the inside cover of the packet. Exhibit B hereto are true and correct copies of the items in the packet.

(Jurat omitted.)

(Exhibits omitted. Exhibits are in Record, Docket #12.)

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Affidavit of Ronald T. Rowan in Support of Request for Preliminary Injunction

Affidavit of Ronald T. Rowan

STATE OF COLORADO)

COUNTY OF EL PASO) ss.

RONALD T. ROWAN, being duly sworn, deposes and says:

1. I am General Counsel for the United States Olympic Committee and have served in that capacity since 1979. I have personal knowledge of the matters stated herein, could and would competently testify under oath thereto if called as a witness.

2. As General Counsel I am responsible for advising and assisting the Executive Director of the United States Olympic Committee ("USOC") with regard to general legal matters involving the USOC. I am also responsible for assisting the USOC Counselor in legal matters concerning the USOC . In this capacity I am responsible for coordinating the everyday activities of the USOC concerning designations and symbols protected under the Amateur Sports Act of 1978 and under trademark registrations. In this respect I notify those organizations, corporations and individuals throughout the United States, of whom we become aware, who use any Olympic terminology and symbols contrary to the protected interests of the USOC. I also follow-up on such notifications and take appropriate additional action as warranted. Such actions are performed at the direction of the Executive Director, and, where there is non-compliance with our requests, I confer with our Executive Director and/or

Counselor concerning what further action would be warranted.

3. The USOC pursues a policy of attempting to obtain compliance with its rights under the Amateur Sports Act of 1978 and enforcement of its registered marks. Each case is weighed on its individual facts and circumstances and the action taken depends on those facts and circumstances. The degree of action may depend on whether the infringement or misuse is of a commercial nature or an athletic competitive nature.

4. Since 1978 the USOC has become aware of a large number of instances where there has been an apparent infringement, misuse, or abuse of its rights under the Amateur Sports Act of 1978 or violation of its registered marks, and has taken action in all but a few of those situations. Of those situations, 15 have involved competitions of one form or another, and the USOC has received compliance in 9 of those. Five are still being actively pursued and one is in litigation.

5. In addition to contacts initiated by the USOC with regard to infringements of its rights under the Amateur Sports Act of 1978, many of the states in the United States cooperate with the USOC in refusing to allow corporations to register in their state if they bear Olympic terminology in their corporate name. The USOC uniformly opposes the registrations of any such names of which it becomes aware and does not grant permission for such use in corporate names.

6. The USOC actively pursues a policy of opposing registrations of any conflicting marks in the United States Patent and Trademark Office which involve the use of any Olympic designation. Since 1978 the USOC has initiated 22 oppositions challenging registration of various Olympic designations, of which, 9 judgments have been entered sustaining these oppositions by refusing registration of the contested mark, 16 proceedings are still awaiting disposition and one opposition was dismissed. During that period the

USOC has also petitioned to cancel one registration of conflicting marks, which proceeding resulted in the cancellation of the registered mark.

(Jurat omitted.)
(Certificate of service omitted.)

File Date: August 16, 1982

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. C-82-4183 RFP

Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction and in Support of Motion to Vacate T.R.O.

(Indexes omitted in printing.)

I. INTRODUCTION

Defendant San Francisco Arts & Athletics Inc. (below, "SFAA") is a California non-profit corporation. (Declaration of Dr. Thomas Waddell, below "Decl.T.Waddell", at para.1,p.1; Decl. M.Evans Ex's CC,DD). Defendant Dr. Thomas Waddell is one of the founders of this organization, and he is the Chairman and an originator of the Gay Games, to be held on August 28th-September 5th, 1982. (Decl.T.Waddell, at para.'s 1, 2 pp. 1-3, para. 5 p. 4).

This litigation concerns the legality of these defendants' use of the term "Olympic" to describe, promote and to sell items to pay the costs of, the Gay Games of 1982.

Through the labors of defendant Dr. Waddell and a number of other volunteers, and with community support and participation in and beyond San Francisco, California, defendant SFAA is staging a program of cultural and athletic events during August-September, 1982, which includes athletic performances and contests in a variety of sports to occur August 28, 1982 through September 5, 1982, at Kezar Stadium in San Francisco, which defendants and others have termed the "Gay Olympic Games of 1982". (Decl.T.Waddell, para. 2 p. 2; see also Exhibits H-L to Decl. T. Waddell).

The declared purposes of the Games includes "present[ing] to the world a serious sporting event from which more respect for gay people will grow", "balanc[ing] the onslaught of the Moral Majority's perspective", "emphasiz[ing] participation and cooperation...not for commercial value", and "[gay persons] seeking respect from others...", as well as related philosophical, aesthetic, educational, social, cultural and political purposes. (Decl.T.Waddell at Exhibits H-L thereof).

On August 9, 1982, plaintiffs International Olympic Committee (IOC) and United States Olympic Committee (USOC) filed suit against SFAA and Dr. Waddell, purporting to claim violations of the Amateur Sports Act of 1978, 36 U.S. Code sec. 371 et seq., the Trademark Act of 1946, 15 U.S. Code sections 1114, 1115, 1116 and 1125(a), the

International Convention for the Protection of Intellectual Property, 15 U.S. Code sec.1126 (h), California's anti-dilution law, Calif.Business & Professions Code sec. 14330, and contract law (Complaint filed 8/9/82). Plaintiffs USOC and IOC moved for a temporary restraining order, which was granted by the Honorable Samuel Conti, U.S. District Judge, on August 9, 1982. The t.r.o. by its terms prohibits defendants and all persons connected in any way with them from using the term "olympic" to sell items relative to the Gay Games, or "...in connection with any advertising, promotion, publicity, or production of any theatrical exhibition, athletic performance, competition or event." (T.R.O. para. ! p. 2 (8/9/82)).

II. THE TEMPORARY RESTRAINING ORDER WAS ERRONEOUSLY ISSUED, AND IT IS HURTING DEFENDANTS AND THE PUBLIC.

A. The Issuing Court Misinterpreted and Misapplied the Amateur Sports Act of 1978.

In issuing the t.r.o. in this action, Judge Conti expressly relied upon and accepted plaintiffs' claim that defendants SFAA and Dr. Waddell have violated the Amateur Sports Act of 1978, 36 U.S. Code section 380, by unauthorized use of the word "Olympic". (T.R.O. p.1 lines 30-31 (8/9/82); Transcript of Hearing, pp. (8/9/82)).[1] In that reliance and acceptance, the issuing Court misread and misapplied section 380 of that Act.

Section 380 of the Amateur Sports Act of 1978 empowers USOC to bring a civil action "for the remedies provided in the Trademark Act of 1946" against any person who:

> "[w]ithout the consent of the Corporation...uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic

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[1]The transcript of the hearing of August 9, 1982 has been ordered on an expedited basis; it will be presented to Court and counsel when it is ready.

performance, or competition

• • •

> ...the words "Olympic", Olympiad", "Citius Altius Fortius", *or any combination or simulation thereof tending to cause confusion, or to cause mistake to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity...*"
>
> 36 U.S. Code section 380 (a) (4) (emphasis added).

Section 380(c) of the Act declares that the Corporation (USOC) has the "exclusive right" to use, *inter alia*, the word "Olympic", subject to section 380(a).

Plaintiffs moved for a t.r.o. on the basis of an unverified complaint, see Rule 65(b) of the Federal Rules of Civil Procedure, and several affidavits/declarations, none of which contains a single factual allegation that defendants' staging and promotion of, and sales of items to cover the costs of, the "Gay Olympic Games of 1982", has involved any use of the term "Olympic", in conjunction with those activities, that tends to cause confusion, mistake, deception, or false suggestion of a relationship with the U.S. Olympic Corporation or any Olympic activity under the Corporation's aegis, as section 380(a)(4), above-quoted, expressly requires. The factual predicate for the argument of plaintiffs that SFAA and Dr. Waddell have violated 36 U.S. Code section 380 is flatly and fatally missing from all of plaintiffs' filings to the Court.

The legislative history of the sections of the Amateur Sports Act of 1978 upon which plaintiffs seek to rely plainly establish that those sections were intended by Congress to enable USOC "...to protect certain symbols, emblems, trademarks, tradenames and words by civil action *pursuant to the Trademark Act of 1946*, House Rep't.No.95-1627, U.S. Code Cong.&Admin. News pp.7483, 7488 (1978) (emphasis added). The pre-existing criminal penalty for unauthorized use of those symbols, marks and names in

infringing ways was found to be unworkable due to the insuperable burden of proving criminal intent. *Id.* at p. 7488. In a letter from the Patent and Trademark Office of the U.S. Department of Commerce to the House committee responsible for the bill that became the Amateur Sports Act of 1978, the Commissioner of Patents and Trademarks stated in relevant part:

> "[36 U.S.Code sec. 380] carries forward some prohibitions from the existing statute enacted in 1950 and adds some new prohibitions, e.g. *words tending to cause confusion, to cause mistake, or to deceive with respect to the Corporation or any Olympic activity.*"
>
> Id. at p. 7496. (emphasis added)

The unmistakable and specific purpose of 36 U.S. Code section 380 was and is to enable USOC to bring civil actions to prevent and remedy unauthorized uses of its distinctive symbols, trademarks, signs and symbols, and words, in trade, for sales of goods and services, and to promote certain events, in those instances where a false appearance or representation, or a confusion, mistake or deception, would tend to result from such uses as between the trader, seller, promoter and/or its goods, services or events, on the one hand, and the USOC and/or any Olympic activity related to USOC on the other hand. The legislative history of this section permits no other gloss on the will of Congress in enacting section 380; yet plaintiffs at bar have been urged a reading of section 380 that altogether eliminates the limiting and focusing language chosen by Congress to express that specific legislative will.

In the case at bar, plaintiffs have failed even to *plead* facts sufficient to constitute a cause of action against SFAA and Dr. Waddell pursuant to 36 U.S. Code section 380, much less to make the factual showing that would be necessary to support plaintiffs' claimed entitlement to preliminary equitable relief. Plaintiffs' factual showing as to violation by defendants of section 380 is not merely deficient; it is absent.

Pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, a t.r.o. may be granted "...only if...it clearly appears from specific facts shown by affidavit or by the verified complaint that *immediate and irreparable injury, loss or damage will result to the applicant...*" (emphasis added). No such showing was made by plaintiffs at bar, because plaintiffs' entire claim of injury based on section 380 depended upon a showing that they never made, to wit., that the "Gay Olympic Games of 1982" were being promoted, or items sold in connection with said Games, in a manner using the word "olympic" in combination with the Gay Games that tends to confuse, cause mistake, deceive or falsely suggest a relationship of the Gay Games and/or their promoters with the USOC or any Olympic activity.

Assuming *arguendo* that the procedurally serious flaw of unverified allegations in plaintiffs' complaint could be set aside, the allegations in the said complaint that are referred to and set forth in plaintiffs' purported claim for relief pursuant to section 380 of the Amateur Sports Act of 1978 (see Complaint at para's 1-9, 11-13, 17-20) do not establish any of the statutory elements of *actionable* usage that are contained in section 380 (a) (3) and/or (4). Each of those allegations of plaintiffs' pleading must be separately reviewed, in order to recognize the total insufficiency of the pleading to state a cause of action pursuant to section 380.

The carrying of a flaming torch by runners across the United States, as alleged in paragraph 6 of the complaint, is nowhere prohibited by section 380.[2] The defendants readily admit that they have used the combination of "Gay Olympic Games" to promote, and to sell items to cover the costs of, the planned events of August 28, 1982-September 5, 1982 in Kezar Stadium. (Decl.T.Waddell, para's 2, 3, 5, 8, 9, pp.2-6,

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[2]Assuming *arguendo* that a Congressional prohibition against the running of a flaming torch across the continental U.S.A. could escape invalidity under the First Amendment guarantee of symbolic speech, Congress did not prohibit or even mention such activity in considering and enacting section 380.

10-11; and see Exhibits H-L to Decl. T. Waddell.)

However, defendants have not used any symbol, emblem, trademark, tradename or insignia of plaintiffs in said promotion and sales, plaintiffs' intimations to the contrary notwithstanding. (Decl. T. Waddell, para. 8 p. 11, and Exhibits H-Y thereof).

Plaintiffs assert in their complaint that they have lost "reputation and goodwill due to mistaken affiliation or association of defendants with the Olympic Games or deception engendered by defendants' continued misuse of 'Olympic' and plaintiffs, other exclusive names, marks, designations, symbols, emblems and insignia". (Complaint, para.11 pp.4-5). But nowhere in plaintiffs' complaint or in any of their declarations or affidavits is there any *factual* allegation in any way supporting the bald conclusions about "mistake", "deception" and the like that plaintiffs offer.

Nor can the elements of false representation, confusion, mistake, deception or false suggestion, as required to be proved by section 380, be presumed in the case at bar. The combination of the words in "Gay Olympic Games" used by defendants in all instances have included the term "Gay". These combinations of words have not been used by defendants in conjunction with any trademark, tradename, sign, symbol or insignia associated with or owned by plaintiffs, nor have the words "Gay Olympic Games" been used in conjunction with the specific symbols and emblems defined in 36 U.S. Code section 380 (a)(1) and (2). Thus it is sheerly defendants' use of the word "Olympic", always in union with and to describe the Gay Games, that plaintiffs attack in the case at bar.

As discussed above, in an action pursuant to section 380 of the Amateur Sports Act of 1978, the word "Olympic", when used as in the case at bar in combination with other words, must be shown to tend to cause confusion, mistake, to deceive or to falsely suggest a connection with plaintiffs and/or their Olympic activities. Those requirements and limits upon section 380 interposed by Congress, which refer to and

parallel provisions of federal trademark protection under the Lanham Act make particularly sound public policy sense in the context of the word "Olympic".

USOC did not register the word "Olympic" as a service mark until 1965, and it did not register the word "Olympic" as a trade mark until 1973. (See Decl.R.Kline Supp. Mo.T.R.O. etc. at Exhibit I thereof). By 1965 and 1973, there were apparently thousands of pre-existing and simultaneous uses of the term "Olympic" in and out of U.S. commerce, in that as of the present there are apparently thousands of such uses of "Olympic" to trade, sell and promote a variety of services and programs throughout the world. (Declaration of Mary C. Dunlap in Opposition to Prelim. Inj. etc. at para. 4, p. 2 and Exhibit B of Decl.M. Dunlap).

If Congress had eliminated the terms "...tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity" from section 380(a)(4), potentially thousands of co-existent and subsequent uses of the term "Olympic" in whatever combinations would be rendered actionable by the enactment of section 380. Plaintiffs would have an apparent right of civil action against virtually innumerable businesses, enterprises, programs and activities across the nation (and in international commerce) that use, have used, or will use the word "olympic" in trade, sales and promotions on or after September 21, 1950. Section 380(a)(4). If Congress had omitted the limiting terms quoted above in section 380(a)(4), the considerable interests of literally thousands of persons in both commercial and noncommercial uses of the word "olympic", distinct from plaintiffs' uses, would have been needless (and perhaps unconstitutionally[3]) disrupted, and made vulnerable to legal doubt and challenge.

In the exact language of section 380(a)(4), it is obvious that Congress determined not to permit every user of the term "olympic" to be vulnerable to such legal doubt and challenge.

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[3]See section II. C. of this memorandum, *infra*.

To be actionable under section 380, an unauthorized use of "olympic" in combination with other terms in trade, sale or specified promotional activity must be proved by plaintiffs to tend to cause confusion, mistake, deception or false suggestion.

To *presume* any of those crucial statutory elements (ie, confusion, mistake, deception, false suggestion) as to the "Gay Olympic Games" at bar, as plaintiffs apparently would have this Court do, would be tantamount to presuming such elements as against every other trader, seller or promoter, whether commercial or otherwise, who uses, has used or might use the term "Olympic" in conjunction with activities as diverse as auto repairs, selling shoes and cookies, and promotion of athletic and dramatic events and entertainments among police, firefighters, seniors, crab-cookers, chili-makers, diaperers and Armenians. (Decl. T. Waddell, para. 2 p.2 and Exhibits BB, EE and App. 1 thereof.)

Obviously, such a presumption is not simply contrary to the letter and spirit of section 380; it would establish the unwarranted and unacceptable legal reality that by such a presumption plaintiffs would gain causes of action against literally thousands of users of the term "Olympic" in trade, sales and promotions across the U.S. and internationally, when Congress neither intended nor created such a result.

In summary, because plaintiffs' unverified complaint and affidavits/declarations do not contain a single fact showing or even suggesting that defendants' use of the phrase "Gay Olympic Games" has violated section 380(a)(3) or (4), and because it would be legally improper and unsound in policy to presume such facts, plaintiffs' motion for t.r.o. based upon Section 380 of the Amateur Sports Act of 1978 was factually inadequate and legally erroneous. The t.r.o. issued on those inadequate and erroneous bases should be dissolved immediately.

B. The Issuing Court Did Not Take the S.T.O.P. Opinion Properly Into Account.

Since enactment of 36 U.S. Code section 380, there has

been only one occasion upon which judicial interpretation of that legislation has been necessitated. In the case of *Stop The Olympic Prison v. U.S. Olympic Committee*, 489 F.Supp. 1112 (S.D. N.Y. 1980), U.S. District Judge Cannella issued a declaratory judgment in favor of plaintiff S.T.O.P., determining that its posters containing the word "Olympic" as well as pictures of five interlocking rings and a hand-held torch, some of which posters were sold directly by S.T.O.P., a non-profit corporation, for money in the nature of "contributions for its cause", 489 F.Supp. at 1114, did not violate 36 U.S. Code section 380 nor infringe or dilute any of USOC's trademarks. *Id.* 489 F.Supp. at 1126, and see Appendix A thereof. Judge Cannella did not decide plaintiffs' claim of a right based upon the First Amendment to distribute the poster; instead, Judge Cannella disposed of the parties' contentions entirely upon statutory grounds.

In the course of that statutory disposition, Judge Cannella had occasion to interpret Congress' intent in enacting section 380, observing in pertinent part that:

> "Notwithstanding the broad wording of subsection(c) it cannot be interpreted to mean that only the defendant (USOC) and its licensees may use the word 'olympic' and the enumerated symbols for any purpose whatsoever...
>
> * * *
>
> it appears that Congress' objective has been to prevent the deceptive or confusing use of these corporations' mottoes, emblems and the like by unauthorized persons...
>
> * * *
>
> [S]ubsection (c) appears to have been designed to prevent all persons other than the U.S.O.C. from registering the Olympic words and symbols as trade marks or service marks in connection with any types of goods or services whatsoever, rather than as a blanket prohibition of all uses whether commercial or not. What little legislative history there is about this subsection

supports this conclusion."

Id. 489 F.Supp. at 1119-1120.

In the case at bar, as in *S.T.O.P., supra,* the unconsented-to users of the word "olympic" are a non-profit organization and its supporters and participants, who are engaged in volunteer efforts conjoined with an original program distinct from USOC and The Olympic Games. Here, as in *S.T.O.P.*, the unconsented-to users of the word "Olympic" are using the term in conjunction with sponsorship, advancement and advocacy of a cause; here the cause is freedom, dignity and respect for all persons without regard to sexual orientation, throughout the world. (Decl.T. Wadell, para. 2 p.2, p.3; para. 6,p.7; para.6, p.8, para. 7 p.9; Decl.A.Rosenfeld, para.2, pp.1-2; Decl.Z.Artman para. 2 p.2; Decl.D.Loberg, para. 2,p.1; and see other declarations).

It is not disputed by defendants that, unlike plaintiff S.T.O.P., defendants at bar have used the phrase "Gay Olympic Games" to promote an athletic performance, and that, to support defendants' non-profit activities and operations in relation to that performance, defendants have sold goods containing the words "Gay Olympic Games". (Decl.T.Waddell, para's 2,3,5,8,9, pp.2-6, 10-11; Decl.A.Rosenfeld, para. 5, p.2; and see Decl. T.Waddell at Exhibits H-Y thereof.)

However, it is strongly emphasized that these sales and promotions are not *per se* prohibited by section 380 (see Section II.A of this memorandum, *supra*). Judge Cannella in *S.T.O.P.* did not have need or occasion to interpret the meaning of the limiting phrases in section 380 (a)(4), because he found S.T.O.P.'s activities not to fall within the purposes or preliminary tests for application of section 380 (sales, etc.). Even so, the District Court's reading of the purposes of section 380 in the *S.T.O.P.* opinion has application to the case at bar, insofar as the cases are similar, as discussed above. Therefore, defendants respectfully submit that the issuing Court's failure to consider the *S.T.O.P.* opinion in granting the t.r.o. was erroneous.

C. The Issuing Court Did Not Correctly Consider The Constitutional Problems Raised By This Suit And By Its Issuance of the T.R.O.

Plaintiffs in this action have sought to sweep aside the potentially significant constitutional issues raised by their suit, by declaring that they are not obligated to respect U.S. Constitutional guarantees because they claim that they are not engaged in "state action", and by further asserting that "...it is clear that the district court may act to enjoin defendants' *commercial* speech". (Pltfs.' Memo. Supp.T.R.O.etc. pp.12-13) (emphasis in original). That abrupt and conclusory treatment of the constitutional questions raised in this action is inadequate, in defendants' view.

Defendants in this action contend that because plaintiff U.S. Olympic Committee is performing a public function specifically delegated and defined by the government, USOC should be held to be obligated to respect the federal constitutional guarantees of free speech, free association and equal protection of the laws. *See, e.g., Marsh v. Alabama*, 326 U.S. 501 (1946) (Holding that "company town" may not invoke state trespass laws to remove Jehovah's Witnesses from town's streets); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 726 (1961) (Holding "state action" shown where state agency owned building in which private restaurant that discriminated by race was located). The extensive and elaborate nature of plaintiff USOC's authority to govern, and to perform public functions associated with the The Olympic Games, and the explicit creation of this quasigovernmental authority by Congress, as well as USOC's use of public facilities and resources in The Olympic Games, make USOC's position that it is not engaged in "state action" very dubious.

But the question of plaintiffs' own "state action" need not (and factually should not) be resolved at the instant stage of these proceedings. The fact that plaintiffs have sought and gained a t.r.o. and are seeking a preliminary injunction, to

restrain non-profit political, educational and cultural use of the term "olympic", clearly establishes the requisite state action for purposes of considering the First Amendment and equal protection-based implications of such court orders, given that such orders are themselves undeniably a form of governmental action by the courts. *Shelly v. Kraemer*, 334 U.S. 1 (1948); *New York Times v. Sullivan*, 376 U.S. 254, 256 (1964).

The cases cited by plaintiffs for the proposition that the district court may act to enjoin *commercial* speech did not address nor even involve potential First Amendment claims of a nonprofit organization that is utilizing a descriptive term, "olympic", to advance noncommercial causes. In *Dallas Cowboys Cheerleaders Inc. v. Pussycat Cinema Ltd.*, 604 F.2d 200 (2d Cir. 1979), upon which plaintiffs seek to rely at bar, defendant was a profit making company that made a movie, "Debbie Does Dallas", in which trademarks of the plaintiff corporation appeared and were used in ways that impaired the value of those marks. The *Pussycat* case did not raise, and it cannot possibly be held to resolve, the distinct question of the permissible extent of limitation by a trademark upon a generic word upon the First Amendment rights of speech and association of a nonprofit organization and those associated with it to use the trademarked word to further educational, political and cultural goals.

In the *Fur Information Case*, cited with approval in *S.T.O.P. v. U S Olympic Committee*, *supra*, 489 F.Supp. at 1125, the District Court observed in pertinent part:

> "While Congress may limit (first amendment) rights to prevent fraud, copyright infringement or palming off, *such limitation must be drawn narrowly, so as to meet the perceived evil, without unnecessary impingement on the right of free speech.*

364 F.Supp. 16, 22 (S.D.N.Y. 1973); aff'd. on other grounds, 501 F.2d 1048 (2d Cir. 1974); cert. denied, 419 U.S. 1022 (1974)(emphasis added).

Defendants in this action contend that Congress did limit

section 380, to protect use of the word "Olympic" in contexts such as the "Gay Olympic Games" here presented. Defendants further contend that the abridgement of First Amendment rights of free speech and association occasioned by the t.r.o. and threatened by further injunctive relief at bar derives not from Congress, but from plaintiffs' own erroneous and overbroad interpretation of section 380, which wrenches the protection of plaintiffs' uses of "Olympic" vis à vis commercial competitors whose uses tend to confuse, mislead and the like out of the built-in limits of section 380 in an effort to apply that statute to defendants' constitutionally protected uses.

But because of the issuing Court's mistaken adoption of plaintiff's erroneous interpretation of section 380, the t.r.o. issued at bar has accomplished a classic prior restraint, consisting of governmental censorship of use of the word "Olympic" by "defendants their employees, agents, officers, attorneys and representatives [and] all persons participating with or acting in concert with [defendants] "*inter alia*," in connection with any advertising, promotion, publicity, or production of any theatrical exhibition, athletic performance, competition or event". (T.R.O. p. 2 lines 6-19 (8/9/82)). Defendants submit that this prior restraint by court order upon their uses of the word "olympic" in relation to the Gay Games has accomplished precisely the harms that the doctrine against prior restraints seeks to prevent, *to wit.*, inhibiting or prohibiting particular speech and/or association via a governmental order that threatens punishment of that speech/association. L. Tribe, *American Constitutional Law* 624-628, 655-656 (Foundation Press, N.Y.; 1978).

Professor Tribe has pointed out that the distinction between "talk for profit, and talk for other purposes" can be very troublesome. *Id.* at 656. But, in the case at bar, this distinction is not troublesome, in that defendants are a nonprofit corporation and a volunteer, whose use of the term "Olympic" is in immediate and inseparable conjunction with the promotion of a publicly supported event/activity, and is

in intentional ideological conjunction with the advancement of freedom and equality for an oppressed group, ie. gay persons. It is noted that speech and association in behalf of this cause has repeatedly been afforded protection by decisions of courts. *See, e.g., Lesbian/Gay Freedom Day Committee Inc. et al. v. Immigration and Naturalization Service et al.*, C-81-2522 RPA (6/17/82) (appeal pending), — F.Supp.—; *Toward a Gayer Bicentennial Committee v. Rhode Island Bicentennial Foundation*, 417 F.Supp. 632 (D.R.I. 1976); *Alaska Gay Coalition v. Sullivan*, 578 P.2d 951 (Alas. 1978); see generally, R. Rivera, "Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States", 30 *Hast. L.J.* 799, 934 (March 1979). Moreover, First Amendment protection of even unambiguously commercial speech may have to be afforded, where governmental intrusion upon such speech restricts the free flow of truthful information", *Linmark Associates v. Township of Willingboro*, 97 S.Ct. 1614, 1620 (1977), or inhibits speech that would provice greater freedom of choice to those members of the public who need it most due to misfortune or discrimination, *cf. Virginia State Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748, 763 (1976).

Defendants in this action also contend that plaintiffs' selection of them as a litigative target represents discrimination against gay and lesbian persons, given that USOC has yet to sue to enjoin, for examples, the Police Olympics, the Senior Olympics, the Armenian Olympics or any other similar group from using the term "olympic" to promote, or make sales in conjunction with such events. (Decl. T. Waddell).

Defendants further contend that the use of federal injunctive power to vindicate plaintiffs' discriminatory choice wholly violates the equal protection guarantee, as it is arbitrary and invidious vis à vis gay and lesbian persons, and as such use of the courts—via injunctive relief—represents the enforcement of law with an unequal hand and an evil eye,

against a human sub-population that is already oppressed and stigmatized by homophobia, stereotypes and bigotry. *Yick Wo v. Hopkins*, 118 U.S. 358 (1886); *Shelley v. Kraemer*, *supra*; *Gay Law Students Association v. Pacific Telephone & Telegraph Co.*, 24 C.3d 458, 488, 595 P.2d 592, 610-11, 156 Cal.Rptr. 14, 32-33 (1979) (recognition of discrimination against gay persons as actionable in statutory context involving quasigovernmental entity).

To find reason in the above constitutional arguments to dissolve the t.r.o. and to deny preliminary injunctive relief in this action this Court need not conclude that any of defendants' constitutional claims and defenses *will* succeed upon its merits in this action. Rather, defendants submit, at the present procedural stage, this Court is obliged only to consider the severe and irreparable harm to defendants and to the public if any of these constitutional claims is upheld, and to weigh the strength of these claims against plaintiffs' purported legal claims. Plainly, in granting the t.r.o. against use of the word "olympic" in this action, the issuing Court did not fulfill that obligation. It is simply this Court's repair of that harmful omission, and not a full-blown inquiry in to the potential unconstitutionality of section 380, that defendants seek to accomplish by this presentation of constitutional issues, at this stage.

D. Plaintiffs USOC and IOC Have Not Made Any Factual Showing Of Injury, Much Less Of Irreparable Injury, That Has Been Or Could Be Caused By Defendants' Use Of the Word "Olympic" In Conjunction With The Gay Games.

Injunctive relief as empowered by the Trademark Act of 1946, to which the Amateur Sports Act of 1978 in section 380 specifically refers, is only available upon a showing of *infringement*. Plaintiffs have offered not one iota of proof of such an infringement by defendants, whether as defined by 15 U.S. Code sections 1114 and 1115 or as defined by 36 U.S. Code section 380(a)(1)-(4). If a likelihood of proving such an infringement is not shown, preliminary injunctive relief may

not be issued, as a matter of the very statutes to which plaintiffs point and the tests for such preliminary relief.

Defendants assume *arguendo* that if plaintiff had shown facts to this Court that supported a finding of a likelihood that defendants would be proved to have infringed plaintiff's trademark as to "Olympic", that at least a part of the factual predicate for a determination that plaintiffs would have need of preliminary injunctive relief to prevent irreparable injury to them would be presented, although in considering the preliminary injunction application the injury to *defendants* would still have to be considered and weighed. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 526 F.2d 86 (9th Cir. 1975). But plaintiffs at bar simply have not made the prerequisite showing as to a likely violation of law, nor have plaintiffs shown any other facts that support the conclusion that plaintiffs IOC and USOC have been injured or might be injured by defendants' use of the word "Olympic" in relation to the Gay Games.

Plaintiffs' memorandum in support of t.r.o. etc. argues without any factual support for the first premise that dilution of the distinctive quality of the term "Olympic" would cause injury to plaintiffs' goodwill conjoined with that term. (Pltfs. Memo.T.R.O. etc. p.14, lines 20-24). But nowhere do plaintiffs show that defendants' use of "Olympic" has caused or even is likely to cause dilution. Like plaintiffs' claim that defendants have violated 36 U.S. Code section 380, apparently plaintiffs would have this Court *presume* "irreparable injury" to plaintiffs. Rule 65(b) of the Federal Rules of Civil Procedure and the precedents of this Circuit governing issuance of preliminary injunctions preclude such a presumption of "irreparable injury". So do the terms of the federal statutes upon which plaintiffs rely. 15 U.S. Code sections 1114, 1115; 36 U Code section 380; *cf. S.T.O.P.* v. *USOC, supra*, 489 F.Supp. at 1121-1123. So also does the California anti-dilution statute, which requires a showing of "[l]ikelihood of injury to business reputation or of dilution of the distinctive quality of a mark . . . [as a] ground for injunctive

relief." California Business & Professions Code section 14330.

As in the instance of the use of "Olympic" in the *S.T.O.P.* case, *supra*, plaintiffs' claims of disparagement and dilution should fail at bar, because plaintiffs here have not shown any facts establishing even a likelihood that the defendants' use of the word "Olympic" in conjunction with their staging, promotion, and sales to pay for, the Gay Games will be found to be false, misleading, injurious to plaintiffs' business reputation or diluting of the distinctive quality of plaintiffs' trademarks as to "Olympic" or otherwise. *Id.* 489 F.Supp. at 1124-1125. Nothing in relevant statutes or case law equips plaintiffs' dilution claim with a presumption that *any* use of "Olympic" other than plaintiffs' own dilutes the distinctive quality of the trademarks. Other realities outside law would also appear to rebut such a presumption, in the case at bar, if law were to provide it. There are associations with "*Gay* Olympic Games" that distinguish defendants' program and materials from any other "Olympic" events or paraphernalia, because of the distinctive nature of the term "gay" and the original format, structure and logos of the "Gay Olympic Games". The public also is experienced in distinguishing The Olympic Games, and the products associated with USOC and The Olympic Games, from apparently thousands of other uses of the term "Olympic" in trade, sales and promotions of a variety of events and contests, including athletic competitions. (Decl. M.Dunlap para. 4 p. 2 and Exhibit B thereof; Decl.T.Waddell, p.2 para. 2 and Exhibits BB and EE and Appendix 1 thereof.)

For this Court to presume, contrary to the separate distinctiveness of the "Gay Olympic Games" and contrary to the wide public familiarity of uses of "Olympic" not associated with USOC and the Olympics, that there is dilution merely by defendants' use of the term "Olympic" would amount to a presumption that those myriad and widespread other uses of "Olympic" in trade, sales and promotions of events as diverse as athletic contests among

police, seniors, or Armenians, also presumptively dilute the distinctive quality of The Olympic Games' invocation of the word "Olympic". In summary, plaintiffs have simply failed to present facts that warrant the conclusion that use of the word "Olympic" in the context of the Gay Olympic Games has infringed upon, disparaged, or diluted their trademark upon "Olympic". Without such a showing, the plaintiffs' claims of injury are hollow, and the proposition that plaintiffs have been irreparably injured by the defendants' use of "Olympic" is factually and legally insupportable.

E. The Injury Being Suffered By Defendants and By The Public Is Severe, Immediate And Not Compensable By Money Damages.

The extensive injuries caused to and suffered by defendants and the other persons governed by the t.r.o. in this action are documented in the declarations that are submitted with this memorandum. (See Decl.M.Dunlap para's 2-3 and Exhibit A thereof; Decl. T.Waddell para's 7-9, pp. 9-12; Decl.M.Evans para's 3-5, pp.1-2; Decl. A.Rosenfeld, para's 2-5, pp.1-2; Decl. Z.Artman, para's 2-4 pp.1-3; and see other declarations of SFAA volunteers submitted herewith concerning the massive personal and political effects of the temporary restraining order in this action).

Those injuries, which are not generally compensable by money damages, include great and special burdens upon all persons who are working on the Gay Games, sadness, humiliation and distress associated with governmentally imposed prohibition, punishable by contempt, of the use of the word "Olympic" in association with the Gay Games, extreme disruption of and interference with the work of the organization and persons who are staging the Gay Games, direct interference with the educational, political, philosophical and cultural goals of those working in this non-profit enterprise to advance the causes of freedom, dignity, self-worth and equal opportunity of gay and lesbian persons in and beyond the USA, insult and hurt at being singled out for litigative attack while other "Olympic" events have been

conducted with knowledge and without restraint by USOC, and insecurity concerning personal, human and legal rights, as well as an obvious and substantial inhibition upon the ability of those working on the Gay Games to promote, to sell items to cover the costs of, and to talk about those Gay Games.

The injury to the public by means of the t.r.o. is no less real and substantial, nor is it any more compensable by money damages. This injury includes violation of the public's interest in fair, even-handed and accurate interpretation of federal laws such as the Amateur Sports Act of 1978, and apparent violations of constitutional guarantees of free speech and association and of the equal protection of the laws, as well as censorship deriving from the prior restraint of the t.r.o. (Declaration M. Dunlap Opp. Mo. Preliminary Injunction, etc., attached, pp.1-2 & Ex.A). Surely the public suffers most from the erroneous applications of federal law that have been crystallized in the t.r.o. issued in this action.

Plaintiffs argue that defendants SFAA and Dr. Waddell are not injured by the t.r.o. because they themselves used the term "Athletic" in lieu of the term "Olympic" for a period of time. (Memo.Supp.Mo.T.R.O. etc. p. 15 (8/9/82)). That argument rips the defendants' temporary non-use of the term "Olympic" wholly out of its factual context, as plaintiffs know; it was for the limited purpose of trying to afford a short grace period while trying to resolve this controversy amicably, in January and early February, 1982, that Dr.Waddell and others briefly forewent use of the term "Olympic". (Decl.T.Waddell pp.5-7 and Exhibits A-E thereof.)

Dr. Waddell's letter to Colonel Miller of January 18, 1982, which was written to offer such a temporary grace period while defendants found out about their legal rights and duties and tried to resolve this matter, was followed *eight (8) days afterward*, on January 26, 1982, with a letter by Dr. Waddell to Colonel Mill and USOC asserting defendants' rights and interests in continuing to use "Olympic", and by a letter from

defendants' attorney on February 12, 1982, which declared and informed plaintiffs' attorney Mr. Kline in relevant part:

> "My client and its representatives, officers and others concerned do not intend to abandon their rights to use the term 'Olympic'",

and which letter from defendants' attorney went on to refer to defendants' then-existing materials containing the word "olympic" offering to asterisk these materials and to label them "not associated with the U.S. Olympic Committee", *solely* as an accommodation to plaintiffs. (See Exhibits A and C to Decl.R. Kline Supp.Mo.T.R.O. etc.) The accommodation offered was rejected by USOC's attorney. (See Exhibit D to Decl.R.Kline).

Plaintiffs' contention that they were unaware of defendants' use of "Olympic" from February through May, 1982, is incredible on the face of it. Defendants plainly informed USOC of their use and intention to continue to use "Olympic" (with or without the asterisk) as of defendants' attorney's letter to Mr. Kline of February 12, 1982, and defendants' use of "Olympic" has been open from that time until the t r.o. was issued on August 9, 1982. Colonel Miller attests that he "did instruct members of the USOC staff to keep their eyes open for any resumed use of 'Olympic'" by SFAA, as of about February 1982. (Aff. D.Miller Supp.Mo.T.R.O. etc. pp. 4-5 para. 8). David Preston, press liaison for USOC, was located in San Francisco through at least March 1982. (Aff. D. Preston p. 1 (8/9/82)). The assertion of plaintiffs that they did not know, and the argument that they should not or could not know, of defendants' use of "Olympic" until June 1982 is thus undermined by plaintiffs' own affidavits.

In any event, the affidavits and declarations of plaintiffs unambiguously establish that plaintiffs were aware of defendants' use of "Olympic" as of early June 1982. (Aff. D.Miller and Aff.D.Preston Supp.Mo.T.R.O. etc.) *Suit was filed by plaintiffs two (2) months later.* In terms of the injuries to defendants and the public caused by the t.r.o., it is obvious that those injuries are being inflicted at the time

likeliest to maximize them, on the eve of the Games on August 28, 1982-September 5, 1982. Nor can these injuries accurately or fairly be trivialized by plaintiffs' carefully stripped reference to the brief period in early 1982 during which defendants forewent use of "Olympic".

F. The T.R.O. Must be Dissolved Immediately.

The t.r.o. issued on August 9, 1982 was issued with no factual foundation for plaintiffs' claims, in contradiction of the terms and legislative history of the Amateur Sports Act of 1978 and other statutes pointed to by plaintiffs, in disharmony with the sole precedent interpreting the Amateur Sports Act of 1978, in disregard of the constitutional problems created by plaintiffs' erroneous interpretation of section 380 of the Amateur Sports Act and in disregard of the apparent violations of defendants' and the public's First Amendment right to be free of prior restraints upon protected speech and orders that chill protected associations, and in spite of a complete lack of factual showing of any injury to plaintiffs, in the face of immediate, severe and non-compensable injuries to defendants and to the public interest. For those reasons, defendants move this Court to dissolve the t.r.o. immediately in this action.

III. PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION SHOULD BE DENIED.

A. Plaintiffs' Motion For Preliminary Injunctive Relief Fails to Meet The Legal Tests For Such Relief.

In Section II. of this memorandum, *supra,* defendants have reviewed certain massive factual and legal deficiencies in plaintiffs' moving papers in support of t.r.o. For purposes of considering plaintiffs' motion for preliminary injunction, certain other significant deficiencies appear, and certain defenses also must be considered, which render plaintiffs' motion for preliminary injunction defective, and which in combination with the other deficiencies already reviewed should result in the denial of plaintiffs' motion for prelimi-

nary injunction. These additional deficiencies and potential defenses are briefly outlined in this section.

Plaintiffs' claims of infringement and dilution are not only factually unjustified and legally unsupported (compare allegations of plaintiffs' complaint in First, Third, Fourth, Fifth and Seventh Claims for Relief, pp.3-5, 6-10, 11 with the terms and tests of the statutes invoked); those claims are also subject to strong defenses by defendants. Defendants claim that plaintiffs are guilty of laches, in part deriving from the fact, admitted by plaintiffs, that plaintiffs did not bring this suit until at least two (2) months after being informed of defendants' continuing use of "Olympic", and in part deriving from the fact that plaintiffs have been aware that defendants claimed the right to use "Olympic" as of late January 1982.[4] *See, e.g. Saratoga Vichy Springs Co.Inc. v. Lehman,* 491 F.Supp. 141 (S.D. N.Y. 1979), aff'd. 625 F.2d 1037 (2d Cir. 1980); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena,* 293 F.Supp. 892 (D.N.Y. 1968) (balancing of equities required as to laches defense). Defendants also claim that the word "Olympic" has been used by defendants in a manner that is fully defensible under the Trademark Act of 1946, "in good faith only to describe to users the goods or services of such party", 15 U.S. Code section 1115(b)(4). *See, e.g., Abercrombie & Fitch Co. v. Hunting World Inc.,* 537 F.2d 4 (2nd Cir. 1976) (where term is not used as trademark, but for description, there is no infringement even as to an otherwise incontestable trademark); *Gracious Lady Service Inc. v. Welcome Wagon International Inc.,* 295 F.Supp. 1373 (D.Pa. 1969) (defendants' use of phrase "gracious ladies" in radio ad to describe its services held not likely to cause confusion, mistake or to deceive as to plaintiffs' similar business; Held: plaintiff not entitled to injunction); *Soweco*

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[4]Defendants also contend that USOC's not taking of any legal action to restrain any of the numerous other "olympic" uses documented by defendants supports the laches defense at bar. *Cf. Saxlehner v. Eisner & Mendelson Co.,* 179 U.S. 19 (1900).

Inc. v. Shell Oil Co., 617 F.2d 1178 (5th Cir. 1980) (good faith dissemination of trademarked word(s) in description of goods, services or in description of geographic origin is defense to claim of infringement).

Plaintiffs' claim of "breach of contract" slides over the facts that Dr. Waddell's letter of January 18, 1982 to Colonel Miller was not an "acceptance" of any "offer" by plaintiffs, or any of them, whether to forego litigation or otherwise, nor was there any meeting of the minds of the purported parties to the after-claimed "agreement". (Decl.T.Waddell pp.5-7 and Exhibits A-E thereof.) *Autera v. Robinson*, 419 F.2d 1197, 1201 (D.C. Cir 1969), cited by USOC's attorney Mr. Kline for the proposition that "...the relative merits of a controversy are irrelevant once there has been an agreement which is predicated on a forebearance of action" (Aff.R.K-line at Exhibit D thereof) actually stands on its own facts for the proposition that even where a party *in litigation* appears to have waived certain rights in an agreement, the facts showing agreement, and the facts to the contrary, must be tried by the Court, and such a factually doubtful claim of "agreement" is not a proper basis for summary enforcement. It is also noted in the case at bar that both Dr. Waddell's letter of January 18, 1982 and Colonel Miller's letter of January 27, 1982 use the term "request" in describing Colonel Miller's statement as to the use of "Olympic" by Dr. Waddell and SFAA. (Decl.R.Kline at Exhibit A pp.4,5). Defendants vigorously contest the plaintiffs' characterization of the exchange of communication between Dr. Waddell and Colonel Miller as an "agreement". Defendants also contend that assuming *arguendo* that this Court were to find an "agreement" upon a trial of the merits of plaintiffs' breach of contract claim, the remedy of specific performance, which is equitable in nature, would not avail plaintiffs in the case at bar, because of equitable bars of laches and unclean hands arising from plaintiffs' waiting over seven (7) months after the purported agreement to seek to enforce it, on the eve of the Gay Games, when enforcement would maximize harm to

defendants.

Defendants also contend that the descriptive and popular nature of the term "Olympic", as established by its wide use throughout the world to market products and promote a variety of interests, must be weighed by this Court in considering the implications of restraining defendants' use of the word "Olympic" to advance their nonprofit cause. Even assuming *arguendo* that plaintiffs were able to prove a statutory case of infringement against defendants under the Amateur Sports Act of 1978, 36 U.S. Code section 380, the constitutional issues in this action concerning defendants' claimed rights to use that word would not disappear; oppositely, these issues would be activated for resolution by this Court. *S.T.O.P. v. USOC*, 489 F.Supp. at 1126.

B. In Balancing The Equities, It Is Obvious That The Hardships Tip Decidedly Against SFAA And Dr. Waddell In This Action.

In the final days of a non-profit corporation's and its volunteers' arduous efforts to present and promote an athletic performance for the benefit of an oppressed minority, plaintiffs USOC and IOC filed suit, seeking to enjoin the non-profit group's use of an ancient and popular descriptive word, "olympic". The plaintiffs have not shown a likelihood that they will prevail on the merits of any of their claims; oppositely, their claims depend upon gross and potentially unconstitutional reading of relevant statutes. Nor have plaintiffs shown a single fact that would support a finding that they have been or will be irreparably injured absent preliminary injunctive relief. Meanwhile, the non-profit group and its unpaid workers and participants already have been injured unnecessarily and seriously by the t.r.o. issued on August 9, 1982, which accomplished a prior restraint. And, meanwhile, the public interests in careful interpretation of federal statutes, and in even-handed and meticulous judicial balancing of rights and harms, in the context of a preliminary injunctive application where rights

of free speech and association appear to be jeopardized, have been wholly overridden by issuance of a t.r.o.

In balancing the equities in this action, defendants respectfully ask this Court to consider the widespread use of the historic term, "Olympic", in relation to diverse commercial and noncommercial activities, the good faith and the non-profit volunteer-dependent nature of defendants' actions, the public interest purposes of the Gay Games, the lack of any fact(s) showing that defendants can possibly be characterized as commercial competitors of USOC and IOC, the particular harm to defendants occasioned by plaintiffs' eleventh-hour timing in this litigation, the substantial legal weaknesses of plaintiffs' claims, the apparent defenses to those claims, the failure of plaintiffs to offer any facts that would support a finding that plaintiffs have been or even might be injured by defendants' use of the word "Olympic" in relation to the Gay Games, and the irreparable hurt and loss of rights and freedoms to defendants that would be occasioned by preliminary injunctive relief in the case at bar. Defendants respectfully conclude that such a balance can only be found to tip in favor of dissolving the t.r.o. in this action and in favor of denying preliminary injunctive relief to plaintiffs herein.

IV. CONCLUSION

For the reasons presented above, in behalf of themselves and all others who have suffered by means of the t.r.o. in this action and who would suffer unwarranted and legally unfounded aggravation of that suffering if a preliminary injunction were granted in this action, defendants San Francisco Arts & Athletics Inc. and Dr. Thomas Waddell respectfully urge and move this Court to order the said t.r.o.

to be dissolved immediately, and to deny plaintiffs' motion for preliminary injunctive relief.

Dated: 16 August 1982

Respectfully submitted

By: Mary C. Dunlap (signed)
An Attorney for Defendants

(Certificate of service omitted in printing.)

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Mary C. Dunlap in Opposition to Plaintiffs' Motion for Preliminary Injunction and in Support of Defendants' Motion to Vacate Temporary Restraining Order

I, Mary C. Dunlap, do hereby declare under penalty of perjury:

1. I am counsel for defendants in this action and I am a member in good standing of the Bar of this Court.

2. From the date of issuance of the temporary restraining order in the action, August 9th, 1982, I have sought to provide advice and counsel to the numerous persons who are restrained by the order as to their responsibilities pursuant to it. I have received inquiries and handled problems from literally dozens of persons. Many of these persons have expressed grave concern and fear to me as to the consequences to them and others if there are any errors in interpreting and obeying the order. In order to prevent anyone from being punished for using the word "Olympic", and regardless

of the First Amendment freedoms that I believe have been and are being infringed by the order, I have been obligated to advise all of these persons to avoid using the word "Olympic" except in answering media-generated inquiries concerning events on and prior to August 9, 1982.

3. Attached to this declaration, and marked "Exhibit A" of this declaration, is a copy of articles concerning the Gay Games from the Bay Area Reporter (B.A.R.), a local gay community newspaper. The word "Olympic" has been excised throughout said articles.

4. At my instruction, defendant Dr. Waddell requested four (4) volunteers to search the public telephone directories of as many cities as possible under time constraints of this submission to establish the extent of usage of the term "Olympic" as indicated by listings in said directories. Attached to this declaration, and marked "Exhibit B" of this declaration, is a copy of the telephone listings copied by machine and by hand on the parts of the researchers.

Dated: 16th August 1982

Mary C. Dunlap (Signed)
Declarant

5. Signed copies of the Declarations of Hydie Downard, Brenda K. Young, Edward H. Peterson and Mark Brown will be presented to the Court and to plaintiffs' counsel at the hearing on August 19th, 1982. These are unavailable as of time of filing of this opposition to plaintiffs' motion for preliminary injunction.

Dated: 16th August 1982

Mary C. Dunlap (Signed)
Declarant

(Exhibits A & B omitted in printing. Exhibits A & B are in Record Docket #13.)

Munich Olympics, to not participating in the last Olympics in Russia and not to take the innocence of the Gay _____ Games and trying to actually *discriminate* us—I feel this is unfair and unjust.

My rights as an American is being threatened and stripped and hurts beyond belief. Being first generation Jew from parents in Poland and through World War II—and as my whole family was killed during that war, I feel once again, one more time—are we to be wiped out again? God help us—Please open your eyes and hearts—change the vicious cycle.

Date August 16, 1982

Sara Lewinstein (signed)

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Alita Rosenfeld in Support of Motion to Vacate T.R.O. and in Opposition to Motion for Preliminary Injunction.

I, Alita Rosenfeld, PhD., do hereby declare, under penalty of perjury: that:

1. I am Alita Rosenfeld, PhD., and my function with the Gay Olympic Games is Sports Co-chair; Women's Outreach, and Board of Directors. My address is 622 Miller Creek Road, San Rafael, California 94903.

2. I have been involved since May 1, 1982. I would like to see Gay men and women get together in an event that is supportive for all and shows the full spectrum of gay people's talents and abilities.

3. The Games are a non-profit California corporation.

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Sara Lewinstein in Support of Motion to Vacate T.R.O. and in Opposition to Motion for Preliminary Injunction.

I, Sara Lewinstein, do hereby declare under penalty of perjury:

1. I am Sara Lewinstein, and my function with the Gay Games is Co-Chair of Bowling, Women's Outreach and member of the Board of Directors. My address is 1255 7th Ave. San Francisco, CA 94122.

2. I am involved with the Games for the purpose of uniting men and women in one of the most positive and healthy ways possible, to better ourselves within our *entire* community—and what better way to show our politics and strength than through *SPORTS!!* I personally live through sports and in hopes of bringing more PEACE into people's lives—a way to unite together—a way to meet new people, no matter what color or race they are. My hopes and expectations are to *unite* as a majority, one and all.

3. & 4. I have worked very hard for the past year on a volunteer basis—hard as volunteerism is, we have succeeded this far in scraping funds from many other people and businesses who also believe and want to help with our goals—which has become their goals now too!

To have the TRO on us is like cutting off my soul. Where is FREEDOM OF SPEECH and sexual preference going to be defined. More than that—what did America stand for. We have used and abused athletes for purpose of *politics* for much too long. From my brother JEWS being killed in the

funds have been raised with sponsorship, by individuals and businesses and selling tee-shirts, pins and posters.

4. I am upset that the U.S.O.C. has decided to discriminate against the G.O.G. and try to stop us. It is clear that this is homophobia.

5. I will not be selling tee-shirts, pins and posters. I will be available to sign this at our Board of Directors meeting this Friday, August 13th 1982.

Date: August 15, 1982

Alita Rosenfeld, PhD (Signed)

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Thomas F. Waddell in Support Of Motion to Vacate T.R.O. and in Opposition to Motion for Preliminary Injunction

I. Thomas F. Waddell M.D., do hereby declare, under penalty of perjury:

1. WHO. My name is Thomas F. Waddell, M.D. and my address is 141 Albion Street, San Francisco, CA 94110. I am a physician, and until the Gay "Olympic" Games project began I was Medical Director of Whittaker Corporation of Los Angeles. With Whittaker's permission I took a leave of absence early in 1981 to begin organizing. I am presently a non-salaried volunteer serving as President of San Francisco Arts and Athletics, a California non-profit organization, and Chairman of one of our projects, the Gay "Olympic" Games.

2. WHY. I am involved with the Gay "Olympic" Games as

an organizer because these Games offer three very important opportunities.

1) To provide a healthy recreational alternative to a suppressed minority.
2) To educate the public at large towards a more reasonable characterization of gay men and women.
3) To attempt, through athletics, to bring about a positive and gradual assimilation of gay men and women, as well as gays and non-gays, and to diminish the ageist, sexist and racist divisiveness existing in all communities regardless of sexual orientation.

As one of the architects of this project, it has been my hope to develop a greater communication and understanding between gay and non-gay communities. It has always been my intent to do this using a totally volunteer non-profit organization which would embrace a philosophy of gradualism, altruism and exemplary action. Athletics and cultural endeavors seemed to lend themselves most appropriately to the goals, and both are embodied in an Olympic-style format.

I am informed and believe that the positive identification of a variety of "Olympics" (e.g. the Armenian Olympics (Exhibit-BB), Police Olympics, Olympics of Ballet, Olympics of the Mind, Senior Olympics, Golden Olympics, Firemens Olympics (Exhibit-EE)) and even the positive attraction of large groups of people to such events as the Crab-Cooking Olympics, Dog Olympics, Nude Olympics, Rat Olympics, WackyOlympics, Xerox Olympics and Alcoholic Olympics have enjoyed trouble free execution year after year with no legal action by the USOC. (Please see appendix 1)

My expectations were that people of all persuasions would be drawn to the event because of its Olympic format and that its nature of "serious fun" would create a climate of friendship and co-operation. Furthermore, false images and misconceptions about gay people would decline as a result of a particpatory educational process, and benefit ALL

communities. I am delighted that that expectation has been, to a large extent, fulfilled, except for the temporary restraining order and lawsuit by USOC et. al.

2. WHAT. San Francisco Arts and Athletics is a non-profit, public benefit California corporation. It has no paid employees, and it has derived its funding from sponsorships donations, spaghetti feeds, dances, public benefits, auctions, raffles, sales of tee-shirts, buttons, posters and cultural events, predominantly in the gay community, but open to all. We have managed to bring together diverse and disparate groups of people in the gay and non-gay community in all our activities, and have established ourselves as a project that consistently benefits the San Francisco community at large. Furthermore we have initiated communication and dialogue among communities all over the world, where none have previously existed. Furthermore, we have an entirely different philosophy than the traditional Olympic Games in that we are emphasizing participation and co-operation and recreational competition as opposed to emphasizing winning and nationalism. Our mandate is to bring people together for greater understanding and physical fitness and not for the purpose of establishing one group being better than any other. San Francisco Arts and Athletics and its games are not operated and are not designed for commercial gain.

3. EFFECT OF THE TRO. The temporary restraining order issued to us has severely damaged our funding (sale of shirts, buttons, other spinoffs etc.) our Public Relations (many potential spectators are under the impression that our Games have been cancelled), our image (it is clear to the public at large that there are many other kinds of 'Olympics', and they see this as demeaning to the term 'gay' rather than the use of the word 'Olympic'). We are now in the process of inking out all our posters, correspondence, information etc., and spending a great deal of time, resources and revenue at a time that is crucial to our event.

4. COMPLIANCE We have complied with the temporary restraining order by deleting the word 'Olympic' from all our

letterheads, correspondence, posters, tickets, program, articles, in short, anything containing the word 'Olympic'. We have removed the word from the awning outside our office. We have stopped the sales of all Gay Olympics Products franchised to local merchants. All, I should add, at considerable cost, inconvenience and precious time. This action has had a severely deleterious effect on the progress of the Games. Irreparable harm has already occurred.

5. BACKGROUND INFORMATION We, San Francisco Arts and Athletics filed papers of incorporation in Sacramento about mid year 1981. In that application we used the word 'Olympic' (Golden Gate Olympic Association). We were told at the time the word 'Olympic' could not be used in a corporate title. We subsequently filed for incorporation on November 4, 1981, as San Francisco Arts and Athletics.

It was our belief, however, that though we could not use the word 'Olympic' in our corporate title, we were not prevented from using the term to describe one of the events we intended to sponsor, i.e. the "Gay Olympic Games". We began using the words "Gay Olympic Games" on our letterheads and mailings and in the local gay press as early as September of 1981.

In mid-December 1981, I received a call from someone at the Women's Sports Foundation, who told me that we may be in trouble. She related that someone from the USOC had been in her office and noticed our newsletter and told her to call us.

She did call us and gave me the number of Olympic House in Colorado Springs, Colorado. I called and spoke to Mike Moran of the Public Relations Department. I described our activities and told him I was aware of other "Olympics" not sanctioned by the USOC. He told me that we should write a letter to the USOC. requesting permission to use the word "Olympic". He also said that it is generally just a formality because the USOC. could not go about taking court action on everyone who uses the word "Olympic".

On December 26, 1981, I mailed a letter (Exhibit A) to Mr. Don Miller explaining our aspirations and reasons for using the term "Olympic".

On December 28, 1981, I received a letter from Mr. Miller (Exhibit B) written on December 23, 1981, warning our organization that we were in violation of Public Law 95-606 and asking us to terminate immediately any reference to the word "Olympic" with respect to our activities and to refrain from using such terminology in the future. He gave us ten (10) days of receipt of the letter to acknowledge his request.

Our organization, still in its formative stages, did not immediately seek legal advice, and on January 15th, 1982 (12.38pm Pacific Standard Time), I called Mr. Miller and asked for a response to my request. He explained the USOC.'s position which I readily understood, and he reiterated his demand to us to cease use of the term "Olympic". I understand his position but did not, and still do not, agree with it.

On January 18, 1982, I wrote to Mr. Miller (Exhibit C) responding to his request because our committee felt threatened and uncertain of our rights. We decided as an interim measure and in a spirit of legal compromise, to drop the word "Olympic" while we sought legal counsel.

We did seek counsel from Attorney Mary C. Dunlap who appraised us of our rights and demonstrated to us the discriminatory demands and unconstitutionality of the USOC.'s position.

I then wrote to Mr. Miller on January 26, 1982, (Exhibit D), informing him of our position subsequent to legal counsel and we suggested an amicable resolution of the issue by February 1, 1982. We furthermore suggested that we would consider seeking formal resolution through federal civil action if no such resolution was forthcoming.

Mr. Miller's letter of January 27, 1982 (Exhibit E) was in response to my letter of January 18. This was our last correspondence.

On February 2, 1982, I spoke to the Northern California

chapter of the ACLU about the issue and their advice was: 1) do not take action against the USOC and 2) if a law suit was filed against us, they would defend us. We then decided to resume the use of the word "Olympic" in the firm belief that we had as much right to use the term as other organizations who had used it without permission from the USOC. I called the "Police Olympics" and the "Armenian Olympics" which had had annual games for a number of years and had also been warned by the USOC's request to drop the term "Olympic". Both organizations had ignored the request and had not suffered an injunction by the USOC. I, myself, volunteered to officiate and serve as a medical doctor for the "Police Olympics" and witnessed the official "Police Olympics" program and tee-shirts (Exhibit F tee-shirt).

There were several letters exchanged between our attorney Mary Dunlap, and USOC attorney Richard G. Kline. The USOC had considered the matter "amicably resolved".

To my knowledge, there has been no further correspondence and we have been using the term "Olympic" publicly since February 1, 1982. Having avoided use of the term "Olympic" from January 18, 1982 to February 1, 1982, caused us a great inconvenience and began to erode our credibility as a serious event. We had no intention of permanently waiving our rights.

6. OUR ORGANIZATION AND PURPOSE

The charter of San Francisco Arts and Athletics states it to be a non-profit, public benefit, educational organization. We have, as a 501-C-3 fiscal agent, San Francisco Tavern Guild Foundation.

We are volunteers and all our revenues are obtained through our own fundraising activites, predominantly local, and predominantly gay sources. Our budget is approximately $250,000 of which approximately $100,000 has been raised.

We are interested in creating a more realistic image of homosexual men and women in all societies. We are also interested in providing more alternatives for homosexual

men and women to move into the mainstreams of their respective societies. We believe that homosexuals, by being stereotyped are stigmatized into ghettos. We further believe that athletics and cultural endeavor is a healthy and positive way to create more opportunities for assimilation and diminishing prejudices.

Moreover, our philosophy also attempts to create a different climiate of competition than in the traditional Olympic Games. We want to stress self-fulfillment rather than winning; we want to exploit the potential for combining physical fitness and achievement through competition without making winning the most important element.

We also want to minimize nationalism, so we used cities as the smallest common denominator. To minimize ageism we have made some events "age-group" competitions. To minimize sexism we have mixed the genders in some sports (relays in swimming and track and field, for example, are mixed).

Our promotional materials attest to all of the above goals (Exhibits G,H,I,J,K).

Another important aspect of our event was the promotion of cultural events. We wanted to encourage gay men and women to explore their creativity and provide balance to the physicalness of the Games. We sponsored cultural evenings (Exhibits L,M,N,O,P,Q) and have planned evenings of music, film and theater (Exhibits R,S,T) during the week of the Games to emulate the true nature of an Olympiad; that of athletics and art.

Finally, we wanted to set a tone of friendship and co-operation to surround the Games and decided on a torch run to begin at Stonewall in New York City, site of the 1969 riot and generally considered the historic beginning of "Gay Liberation" in America. The torch would be carried across the United States by more than 2,000 runners and be carried into Kezar Stadium for the opening of the Games (Exhibit U).

In attempting to eliminate discrimination we felt that we

could not turn about and discriminate, so being "gay" was of no consequence. I have yet to encounter a test to tell if someone is or is not homosexual, and that is the crux of the educational value of the Gay Olympic Games; the differences between gay and non-gay have to do with an individual's choice, and should not be the sole criteria for judgement of character.

We are interested in seeing ALL people come together for healthy reasons. Sport and art are the best vehicles we can imagine.

7. WHAT HAS HAPPENED

The response to our proposed event has been rewarding (Exhibit V). We have brought together previously disparate groups of people, gay men and women, gays and non-gays, Catholics and Jews, Democrats and Republicans, rich and poor. We have stimulated new dialogue in communities world wide and have created a climate of goodwill and enthusiasm for all involved (Exhibits W and X).

8. WHY OLYMPIC?

The term "Olympic" best describes our undertaking. It is for the same reasons—those of peace, friendship and positive social interaction—that the Police and Firemen, Armenians and Senior Citizens, Handicapped and Youngsters all enjoy their own separate "Olympics".

If the purveyors of law and order (the Police) are able to ignore a Federal law and escape judgement, it seems perfectly obvious to me that the "Gay Olympic Games" are being selectively prosecuted. Since I know of no other organization, athletic or otherwise, using the term "Olympic" having been restrained from such usage by the USOC I must conclude it is not the word "Olympic" that creates so much objection but the word "gay".

I have also submitted our press kit (Exhibit Y) as additional information regarding the nature of our endeavor.

I have been working (pro bono) for the Police Activities League of San Francisco for one year as their physician for boxing. As a result I was asked to perform a similar duty at

the 16th Annual Police Olympics.

I had been aware of the Police Olympics for years and in February 1982 I called Officer Joe Mollo of the San Fracnisco Police Department who was director of the 1982 California Police Olympics. He told me the winners would go to Dallas for the National Police Olympics, and then on to the International Police Olympics. I asked Officer Mollo what, if any, problems he had had with using the term "Olympics". He said "we received a letter telling us not to use it, but we are ignoring it". The USOC *was* aware of their event.

I did work for their event which began on July 7th and submit their program as Exhibit Z, and I refer specially to page 4 describing their organization which is not unlike our own. Their awards (medals) also used the term "Police Olympics". Furthermore I point out the five interlocking rings of their logo, of which two of the rings are handcuffs.

I have also been made aware of the "Firemans Olympics" held in July-August of this year. See Exhibit AA which uses five interlocking rings in front of a lighted torch.

In reference to our alleged violation of "Olympic" symbols, I am only aware of the use of the term "Olympic". We do not use five interlocking rings. We have totally dissimilar logo which depicts three integrated discs, not rings, in a fashion that bears no resemblance to the five interlocking rings of the traditional Olympic Games. See Exhibit BB, CC and DD which depict our logo as well as our event title. The word "GAY" always precedes use of the word "Olympic".

Exhibits EE and FF also attest to the fact that when we conceptualized our event we were interested in using sports events that were already popular as organized sports in gay communities. There are six departures (billiards, bowling, rugby for women, softball, powerlifting and physique) from the traditional Olympic Games, as well as many omissions (equestrian, gymnastics, fencing, water polo, weightlifting, field hockey, shooting, judo etc. etc.) which do appear in the traditional Olympic Games. See Exhibits II and JJ.

9. THE EFFECT OF OUR EFFORTS

Our philosophy and outreach has engendered a great deal of good will, approval and participation throughout the Bay Area and across the United States. Dianne Feinstein, Mayor of San Francisco, has been an ardent support of the "Gay Olympic Games" since its inception. She proposed a proclamation creating "Gay Olympic Games Week" for August 28th to September 5th, and in fact delivered the proclamation at a news conference in her office on Thursday August 12th. (Exhibit AA). She, at our request removed the term "Olympic" from the proclamation, to our mutual embarrassment and consternation. A similar proclamation was presented to the Police "Olympics" this year (see Exhibit Z page 2) with no restrictions on the term "Olympic". In addition to her proclamation was a commendation to the Gay Games on behalf of the Board of Supervisors of San Francisco for our work in the project.

I pray that there is a rapid resolution of the issue in favor of the "Gay Olympic Games" so that the damage to our event is minimized.

Date August 15, 1982

Thomas F. Waddell M.D. (Signed)

(Exhibits and appendixes to the Declaration omitted in printing. Exhibits are in the Record, Dockets #'s 17 and 28.)

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Michael R. Evans in Support of Motion to Vacate T.R.O. and in Opposition to Motion for Preliminary Injunction.

I, Michael R. Evans do hereby declare, under penalty of perjury: that:

1. I am Michael R. Evans, and my function with the Gay _____ Games is member of Board of Directors and Attorney. My address is 2120 Market St. #203, San Francisco, CA 94114.

2. I am involved with this organization because I believe it is very important to help dispel public prejudice about Gay people.

3. This is a non-profit, public benefit corporation, engaged in charitable and educational activities relating to correcting the public images and perceptions of Gay People. (Exhibits CC, DD) We are an all-volunteer organization which exists on public donations from those who believe in our cause.

4. As both a Board member and an attorney, I have been charged with handling the routine legal affairs of the Corporation. The effect of the T.R.O. on me has been to distract me from my regular legal duties to spend my time instead worrying about problems of compliance. This is at the very time when we have important tax and other planning matters which should have my complete attention on the very eve of the Games.

5. Every time that I have seen the word "Olympic" on any of our materials, I have checked to see that it was covered-over, or made sure that someone was going to take care of it. This is an exceedingly tedious and wasteful expenditure of time, which has made the frantic pace of activity at our office even more chaotic.

8-15-82

Michael R. Evans (Signed)

(Exhibits omitted in printing.
Exhibits are in the Record, Docket #s 18 & 28.)

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Richard C. Leonard in Support of Motion to Vacate T.R.O. and in Opposition to Motion for Preliminary Injunction.

I, Richard C. Leonard do hereby declare, under penalty of perjury: that:

1. I am Richard C. Leonard, and my function with the Gay _____ Games is that of Volunteer Coordinator; Chairman. My address is 49 Molino Avenue, Mill Valley, California 94911.

2. I became involved with the Gay _____ Games for several reasons. My personal and professional life was in a period of great transition. In order to re-enter into the social and professional world, I decided to do volunteer work. I had heard of the Gay _____ Games and thought it was a good cause; one which would be interesting, fun and gratifying to work for. The Gay _____ Games particularly appealed to me for several reasons. I have always had a love of sports and the arts, yet I have had difficulty in meeting people with similar interests, especially in the former. This organization seemed to offer an ideal opportunity to work with and meet people from a large cross-section of the gay community who shared a common interest. In addition to meeting people and working with them towards a common cause I hoped to help create an event which would be enjoyable to everyone to participate in, watch and work for. An event that would help dispel many myths and stereotypes about gays and lesbians.

I place great value on arts and athletics, straight or gay,

and their importance for individuals and society as a whole. I have also been very distressed by the separatist elements within the gay community—which I hope would begin to be mended by this kind of united effort. I have been very pleased and impressed by what I have seen so far. The support which we have received from and the 'education' which we have imparted to many in the heterosexual community has been most gratifying. Finally, I have received an extraordinary opportunity to hone and expand my managerial skills, organizational abilities and experience in working with a diverse group of people in a personal way.

3. The Gay Games are a non-profit organization run entirely by volunteers. The intention never was, nor shall be, materialistic. Rather, it is idealistic. Money has been raised through sponsorship, personal contributions and fund-raisers. No individuals or groups have used this opportunity for financial gain. They have given because they believe in the idea, and wish to support it. None have contributed more than those individuals who have given freely of their time and talent to produce this event. Through our efforts, we have united people from across the country and around the world. Hopefully, permanent networks of athletes will be established as the result of our work. I have personally answered many letters from people all over the world who have written to say 'thank you' for doing this.

The excitement and interest we have generated has been exceptional. I have sold tickets to an individual who could not come, but wanted them for commemorative reasons. I have sent information to a man in Sri Lanka who believes in us and who wanted to spread the word. I have received many letters from small-town Americans and Europeans who wanted merchandise and information; who wished us well; who would have liked to be here and who expressed their appreciation (and envy) of San Francisco and of what we are capable of doing. Most importantly and rewardingly, they felt involved in absentia, and united by our accomplishments.

4. The Temporary Restraining Order has had an effect on

my work in the following ways:

1. I have had to deny to persons their interest in purchasing tee-shirts, posters, pins, buttons etc.

2. I have had to answer the phone "Gay Bleep Games". While this can sometimes be amusing on a superficial level it is patently absurd.

3. I have been unable to send out information without spending an inordinate amount of time on censoring the literature.

4. I have had to watch key people devote an inordinate amount of time to this literature, which has made them inaccessible, and placed an extra burden on the rest of us.

5. After an initial delay in ordering tee-shirts, the TRO has necessitated a further delay and a change in design which is esthetically disappointing and ideologically distressing.

6. I am personally offended by the action of the USOC and the IOC. They have not only personally placed us below "crab-cookers" and "xerox people", thereby displaying bias and discrimination, but by taking this action at the last minute they have created not only a loss of revenue but also extreme disruption of our organizational efforts.

5. I have complied with the TRO completely.

A. I do not sell merchandise with the word 'Olympic' on it.

B. I do not use the word 'Olympics' in replying to or making phone calls.

C. I have changed the original design of all tee-shirts.

D. I have censored all literature I send out of the office concerning the Games.

E. I have issued instructions to all volunteers to take similar action with regard to points A, B and D.

August 15, 1982

Richard C. Leonard (Signed)

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Mark Brown in Support of Motion to Vacate T.R.O. and in Opposition to Motion for Preliminary Injunction.

I, Mark Brown do hereby declare, under penalty of perjury: that:

1. I am Mark Brown and my function with the Gay Games is co-founder of the organization, Secretary-Treasurer of the corporation (S.F. Arts and Athletics, Inc.), Secretary-Treasurer of the Board of Directors and Sports Committee Chairman of the 1982 Gay _____ Games. I live at 4323 - 20th Street, Apt. No. 7, San Francisco, California 94114.

2. As Co-Founder of this organization; along with Dr. Tom Waddell, I wanted to see Gay Men and Women brought together in sports to compete in an olympic type atmosphere. To compete in an atmosphere that "I am Gay and proud of it".—to compete as Human Beings and not parasites—to compete in an atmosphere void of harassment and ridicule that would surely arise if they were competing in the regular Olympic Games and admitted they were homosexual.

These games are important to all of us, Gay, Straight, Black, White, Chicano—all of us—not because Gay's are better than anyone else but because gays are equal in stature and are normal human beings as all else, not freaks as so many straight people are led to believe.

I personally do not expect to gain anything out of these games other than the satisfaction of seeing Gay men and women athletes perform to their best ability in an olympic

style competition. I have devoted my life for the last two years in promoting and planning these games. The Gay Games consists of 17 competitive sports for men and women of all ages to participate in. Thus far, 11 countries, 25 states, 110 cities and over 1,300 athletes have entered these games.

4. San Francisco Arts & Athletics is a non-profit corporation. All monies raised have been by donations and fund-raisers. The San Francisco Gay Community has supported this endeavor from the beginning. The national and international support has also been outstanding. This endeavor has brought Gay men and women together from all over the world in a common cause—SPORTS! This temporary restraining order has hurt the income of these games tremendously—our T-shirts, buttons, pins and posters are our main sources of regular income. We have no paid positions, but the expenses at this time are astronomical. These games are costing approximately $250,000 to put on. This TRO is harming our income to meet expenses.

As for me personally, as an American citizen, having lived a full and complete life for my 48 years, this TRO is depriving me of my rights and freedoms as an American. No one, especially our United States Congress, without the approval of the people, have the right to disallow any citizen their right to the non-profit and non-commercial use of any word in the dictionary. It is un-constitutional and must be corrected.

Because of the TRO, I have taken steps in the department I am in charge of to refrain from using the word "olympic" until this crisis has been resolved.

I am available to sign this document at any time.

Undated

Unsigned

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Zohn F. Artman Jr. in Support of Motion to Vacate T.R.O. and in Opposition to Motion for Preliminary Injunction.

I, Zohn F. Artman Jr. do hereby declare, under penalty of perjury:

My name is Zohn F. Artman Jr. and my function with the Gay _____ Games is as a member of the Board of Directors of San Francisco Arts and Athletics Inc. My address is 9, Turquoise Way, San Francisco, Ca. 94131.

2. I am a 20-year resident of San Francisco and have spent the last eleven years as an active San Franciscan and member of the local entertainment community. For 8½ years I was V.P. Press and Public Relations for Bill Graham Presents, and for the most recent three years have operated my own media firm, Zohn Artman Presents. The client list for my company includes Bill Graham Presents, The David Geffen Company, The Grateful Dead, the Pride Center, Atlas Savings and Loan, Huckleberry House ... as a partial list. Because of this media experience I happily agreed to bring my talents to the Gay Games: obviously the Gay Games needs media attention.

The Gay Games present to me, as a loving San Franciscan, a real opportunity to allow the world, not to mention parents and family members, to see their gay sons and lesbian daughters as healthy, athletic people leading happy, participatory lives. These games have created for the gay community an opportunity to participate in sports where the goal is

not being from the 'best' country or nation; nor about being the 'best', or about men being stronger or better than women—rather these games have as their goal a real chance to be a participant for the sheer joy of it.

3. San Francisco Arts and Athletics is a non-profit organization, raising funds in grass-roots ways. Musical fund-raisers in private homes have raised $100 to $400 plus. Auctions in bars and restaurants have raised hundreds, sponsors at $200 each have raised thousands. The support from the total San Francisco community has been overwhelming and heart-warming. All funds raised are being applied to the expenses of putting on these Games.

4. The TRO has hurt me only in the personal sadness I feel as an American and my loss of the protection I have always felt under the Bill of Rights on which this great country is founded. As far as my Gay Games related activities, the TRO has created a giant amount of media work to cover it, and may I add that all of my work has been pro bono; and this extra TRO work has taken my focus off the sports events, the Opening and Closing Day ceremonies, including the important job of selling tickets through making our ticket-buying public aware of how to purchase tickets to these events. All of this activity has had to be put on 'hold' while I deal with the TRO press and problems related thereto. In addition I have been busy asking our outlets to take the merchandise off their shelves with the TRO name on it.

August 15, 1982

Zohn F. Artman Jr. (Signed)

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Brenda K. Young

Declaration of Brenda K. Young in Support of Motion to Vacate T.R.O. and in Opposition to Motion for Preliminary Injunction.

I, Brenda K. Young do hereby declare, under penalty of perjury: that:

1. I am Brenda K. Young, and my function with the Gay _____ Games is Editor of Gay _____ Newsletter, member of Board of Directors. My address is 410 Bellevue Ave. Oakland, CA 94610.

2. I am involved because of the tremendous effect athletic participation has had in my life, combined with my feeling that gay men and women could work equally together in this venture, the Gay _____ Games became my sole extra-curricular activity.

3. I have been involved with the Gay _____ Games for over one year. I have been intimately involved in our efforts to obtain non-profit status. I personally created fundraising situations where local business people donated space, time and money for our effort. It is a community venture—unifying segments which have previously, always, been disparate. Gay leaders throughout the country are watching and applauding the effect this event is having on not only the "gay community" throughout the world, but also the non-gay populace which is more readily willing to identify with us through our athletic garb.

4. The TRO has hindered my efforts as Editor of the Gay Games Newsletter to present a smooth readable and

informative letter. Production was held up for 4 days past deadline until the ramifications of the TRO could be assessed. As a publicist, the TRO has created a logjam in my efforts to promote the Games, encourage the purchase of tickets and to further encourage residents of the Bay area to house the 1,500 athletes coming to San Francisco for the period August 28-Sept. 5.

To comply with the TRO, I have taken the following steps:

I have deleted every reference to the word "Olympic" in the Gay Games newsletter.

I have crossed out the word "Olympic" on all fundraising literature that I have come across around San Francisco.

I have explained to all those who have asked that our organization is temporarily forbidden to use the word "Olympic.

Date:
Signed: (Unsigned)

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Harriman Thatcher in Support of Motion to Vacate T.R.O. and in Opposition to Motion for Preliminary Injunction.

I, Harriman Thatcher do hereby declare, under penalty of perjury:

My name is Harriman Thatcher, and my function with the Gay _____ Games is Cultural Week Co-ordinator. My address is 507 Peralta Avenue, San Francisco Ca. 94110.

I am retired and wanted to participate in meaningful volunteer work. The Gay _____ Games provided a made to order opportunity to counteract the negative image of gays as athletes but as human beings as well. Frankly, I was ready to come all out for a cause that restored honesty to my life and pride in the work of the Games.

3. I am familiar with the non-profit nature of the sponsoring organization and its efforts to raise funds on the basis of goodwill for its own cause.

4. In my own area of responsibility the TRO is causing considerable concern from a mechanical point of view. I have a number of circulars and programs at the printers which must be changed. The resulting confusion may limit participation and therefore attendance at the two cultural events scheduled.

5. I have ordered that all printing, notices, etc, be stopped in order to comply with the Court's directions.

Date: 8-16-82

Harriman Thatcher (Signed)

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Edward H. Petersen in Support of Motion to Vacate T.R.O. and in Opposition to Motion for Preliminary Injunction.

I, Edward H. Petersen do hereby declare, under penalty of perjury: that:

1. I am Edward H. Petersen, and my function with the Gay _____Games is Athlete's Discount Coupon Pack

Organizer. My address is: 284 Richland Avenue, San Francisco, California, 94110.

2. I am involved because I think the Games will help change preconceived stereotypical notions about who gay people are, what we look like, and how we act. The Games would give gay people good (P.R.) exposure for a change. I also feel that it is critically important for gay people of different nations to get together to exchange ideas, to see the similarities and differences in our perspectives about our positions in our societies, in order for each of us to formulate plans to make our lives and lifestyles better. This exchange of ideas will help foster better understanding between different peoples of different nations. I think that this understanding along with the athletic participation and cultural events are much more in line with the ideals of the original Olympic Games than the current political jockeying that occurs at games sponsored by the International Olympic Committee where nation is pitted against nation for political prestige in the international arena of public opinion.

The nature of the Gay _____ Games is one of total gay community involvement throughout the USA and the world. The torch is being lit at Stonewall in New York, where the first definitive stand against gay harrasment and gay discrimination occurred in the United States. Gay women and men from countries across the USA are carrying it from Stonewall to San Francisco. I see this torch as a symbol of freedom from the pervasive homophobia so strongly entrenched in some segments of our society; it is an educational symbol, both to the gay community itself and to the general populace.

No one is involved in the games for the money. All of us are volunteers. The Gay Business Community across the nation has been supportive, both financially and philosophically. The Gay press in Europe, Australia, New Zealand, Canada have covered the preprarations for the games extensively because of the pride that the games will engender in the gay community. Fund-raising through the sales of

posters, buttons and tee-shirts has been financially important to the games. The business community is donating discount coupons to be given to each of the athletes to ensure that they will enjoy their stay here during the games. I am organizing that effort, which is supported even by non-gay businesses such as Marriott's Great America. There has been international gay community involvement and support for the games.

4. The Temporary Restraining Order has hindered my efforts to get the Athlete's Discount Pack together. My flyers all have the word "Olympic" on them in seven places so I have to amend each flyer by hand.

5. I have taken the following steps to comply with the TRO:

A. Crossed out and/or blacked out the word "Olympic" on all flyers and stationery that I have used.

B. Advised all business owners that I have been able to contact not to use the word "Olympic" in their athletes discount coupons which they are preparing for the athletes.

Date: (Undated)

Edward H. Petersen (Unsigned)

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Paul Mart in Support of Motion to Vacate T.R.O. and in Opposition to Motion for Preliminary Injuction.

I, Paul Mart do hereby declare, under penalty of perjury:

that:

1. I am Paul Mart, and my function with the Gay _____ Games is Assistant to Tom Waddell, Fund Raising, and member of the Board of Directors, S.F. Arts and Athletics. My address is 2101 Sacramento Street, San Francisco, California, 94109.

2. I believe that there is a need to show the world that "Gay" people are in every field—that sports and music are the best way to get people to understand each other and bring us all closer together.

3. By helping to raise funds, we did not have to call upon city or state funds—The Gay Games will bring happiness and goals to Gay people, otherwise not afforded to them.

4. TRO has caused me to be upset at Olympic (International) to which I contribute, and have attended two games. I see no reason for this TRO. I believe the word "olympic", as described in the dictionary, is originally Greek, and no one can give this word to anyone. Also, our logo is different, our posters and colors are completely different and no one can confuse the two! No one has ever contested the word "Olympic" before—I feel I personally am singled out because I am helping with these Gay Games.

5. Have assisted in removing the name on all publicity, etc.

I will sign this statement anytime.

Date: August 14, 1986

Paul Mart (Signed)

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Derrill Loberg in Support of Motion to Vacate T.R.O. and in Opposition to Motion for Preliminary Injunction.

I, Derrill Loberg do hereby declare, under penalty of perjury: that:

1. I am Derrill Loberg and my function with the Gay _____ Games is to locate housing for the visiting athletes and to serve on the Board of Directors.

2. I've become involved with the Gay Games (over a year ago) because I wanted to become involved with a community organization which would benefit the people as well as being a fun event. What better than an athletic event with a cultural week. This way, everyone could participate. • • • I joined in as a helper in fund raising—auctions, etc. I would meet the local businesses when gathering articles for the auctions. These people were generous in their donations as well as bidding on items. They all believed that the Gay Games was a worthwhile event. My belief in the event was greatly strengthened by this support. I have been involved with bake sales, basketball games, piano recitals and many more fundraising events.

4. The TRO has taken a great deal of my time and energy from the original goals of the games—and I have complied with this TRO in every way possible.

I am available to sign this document at any time.

Date: August 15, 1982

Mr. Derrill Loberg (Signed)

File Date: August 18, 1982

(Names & caption omitted in printing, see J.A. 5, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Reply Memorandum in Support of Request for Preliminary Injunction

* * *

(Indexes omitted in printing.)

I. SFAA's NON-PROFIT STATUS GIVES IT NO RIGHT TO INFRINGE PLAINTIFFS' PROTECTED MARKS.

A. Section 380 of the Amateur Sports Act applies to defendants.

Defendants assert that because San Francisco Arts & Athletics ("SFAA") is a non-profit California corporation, any "Olympic" activities it organizes, promotes or conducts do not constitute "trade" and are therefore not within the purview of 36 U.S.C. § 380(a). The assertion does not withstand scrutiny.

First, the express language of section 380(a) provides that plaintiff's names and marks may not without USOC's consent be used to promote "*any* theatrical exhibition, athletic performance or competition," regardless of whether such promotion constitutes "trade," or whether the performance or competition are profit-making.* But defendants are using "Olympic" and the simulated IOC symbol to promote such activities, and the statute plainly forbids this.

Second, even if the statute made no reference to "athletic

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* Under defendants' theory, liability for infringement might hinge on whether an athletic performance or competition turns a profit to its organizers.

performance or competition," section 380 (a) applies to "*any* person," and there is no basis for distinguishing those juristic persons organized for profit from those engaged in non-profit activities. Under California's Non-Profit Corporations law, a so-called public benefit corporation such as SFAA (Evans Decl., Exhs. CC, DD) may conduct a wide variety of activities, including:

> "Carry on a business at a profit and apply any profit that results from the business activity to any activity in which it may lawfully engage" (Cal.Corp.Code, § 5140(1)).

Third, even if the statute prohibited use of "Olympic" and plaintiffs' marks only for purposes of "trade," defendants here are engaged in trade. They sell "Olympic" T-shirts, buttons, posters and bumper stickers displaying various "Olympic" designations (Miller Aff., Exh. C, pp.3, 5). Defendants are organizing and promoting an international "Olympic" sports competition as well as a variety of other "Olympic" festivities by use of the mail, marketing commemorative items and souvenirs, accepting entries from prospective participants located throughout this country and abroad, and disseminating promotional advertisements contained in defendants' publications to raise money to support the Gay Olympic Games (Walker Decl., Exh. B; Petersen Decl., p. 3, Brown Decl., pp. 2-3; Rosenfeld Decl., p. 2). That defendants do not anticipate a profit from these activities is immaterial: "It is not necessary, in order to constitute trade or business, that it shall be carried on for profit" (*Medical Association* v. *United States* (D.C.Cir. 1942) 130 F.2d 233, 237, affirmed (1943) 317 U.S. 519).

B. The S.T.O.P. case is inapposite.

Defendants attempt to persuade the Court that section 380(a) should not be applied to them by relying upon *Stop the Olympic Prison* v. *U.S. Olympic Com.* (S.D.N.Y. 1980) 489 F.Supp. 1112. Such reliance is misplaced. S.T.O.P. was a non-profit public interest group concerned with prison reform and organized to increase public awareness of and

generate opposition to the construction of a Federal prison that would also be used to house athletes participating in the 1980 Lake Placid Winter Olympic Games. To further its protest activities, S.T.O.P. designed and distributed a poster with the legend "STOP THE OLYMPIC PRISON" which displayed the Olympic rings and torch. These posters were, for the most part, given away free of charge. S.T.O.P. was not engaged in the promotion of any athletic activity whatsoever, nor did S.T.O.P. sell any merchandise displaying Olympic designations. Thus, the court held that S.T.O.P.'s use of Olympic designations was not even within the ambit of section 380(a) (489 F.Supp. 1121).

In sharp contrast to the activities of S.T.O.P., SFAA is organizing an international Olympic Games (Brown Decl., p. 2), involving Olympic sports and events (Waddell Decl., p. 11), promoting the sale of Olympic souvenirs, referring to fund-raising events as "Official Olympics Entertainment" (id., Exh. T), "Olympian celebration" (id., Exh. Y), "The Olympic Office," "Olympic Headquarters," "Olympic Flag Corps," the "Olympic Committee," the "offical Olympic T-shirt" and the "Olympic emblem" (Miller Aff., Exh. C, pp. 4-6; Waddell decl., Exhs. H, Z). The record is replete with references by defendants to themselves and their activities as Olympic in an *official* or authentic context. And Dr. Waddell was publicly reported as noting that "Gay" serves as no basis for defendants' competitions:

> "If he [Waddell] has his way, he'd remove the 'Gay' from this competition and the entire community or movement. *** 'I'd like to change it to People's Olympics. Please believe me that it will be an athletic competition and a means of self-fulfillment for everyday people doing everyday things' " (Preston Aff., Exh. A, p. 2).

Such activity clearly falls within the language of section 380(a) and should therefore be enjoined.

II. PLAINTIFFS HAVE MADE THE REQUISITE SHOWING OF CONFUSION.

Defendants' contention that there is no evidence in the

record that their use of the word "Olympic" has created any confusion is without foundation. It is based on a misunderstanding of the law and a disregard of the facts.

Section 380(a) makes actionable any use of the term "Olympic" or similar terms "*tending* to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the [USOC] *or* any Olympic activity" (36 U.S.C. § 380(a)(4)). The record is more than sufficient to show that the public would "tend to" believe that plaintiffs are organizing or sanctioning defendants' competition or are otherwise connected or associated with it. Defendants have used the "Olympic" terminology and symbols to promote an international human athletic competition; they have organized a series of events to occur over a period of several days; they have included Olympic ceremonial events, including the carrying of a torch, an opening parade, and closing ceremonies; participants will represent their countries or cities and march behind the flags of these at the opening and closing ceremonies; defendants have organized competition in Olympic sports; they have solicited contributions under the Olympic name; and they have sold goods and other materials under that name. Indeed, defendants admit that they are hoping to create "an Olympic-style format" (Waddell Decl., p. 2). These facts plainly meet the standard of section 380(a)(4).

The Lanham Act employs a "liklihood of confusion" test (*Golden Door, Inc.* v. *Odisho* (9 Cir. 1980) 646 F.2d 347, 351; *AMF, Inc.* v. *Sleekcarft Boats* (9 Cir. 1979) 599 F.2d 341, 353), a more stringent standard than section 380's "tending to cause confusion" standard. But contrary to defendants' suggestion, proof of *actual* confusion is not required in a trademark action (ibid.). Because of the difficulty in obtaining evidence of actual confusion, its absence is not dispositive; actual confusion is a significant factor only when such evidence exists (*AMF, Inc.* v. *Sleekcraft Boats*, supra, 599 F. 2d 353).

In determining the likelihood of confusion under the

Lanham Act, courts examine such factors as the strength of the plaintiff's mark or name, the similarity of the marks, the similarity of the products, the marketing areas and defendant's intent in selecting the mark (id., pp. 348-349). Under the undisputed facts of this case, there can be no doubt that defendants' use of Olympic terminology and symbols "created a strong impression to the average consumer that plaintiff sponsored or endorsed defendants' goods or services" (*Visa International* v. *Bankcard Holders of America* (N.D.Cal. 1981) 211 U.S.P.Q. 28, 40; see also *Golden Door, Inc.* v. *Odisho* (N.D.Cal. 1977) 437 F.Supp. 956, 963-964, affirmed (9 Cir. 1980) 646 F.2d 347).

Defendants erroneously contend that their use of the term "Gay" before "Olympic" sufficiently distinguishes their activities from plaintiffs' and eliminates the possibility of confusion. Precisely this type of contention was considered and rejected in *United States Jaycees* v. *San Francisco Jr. Cham. of Com.* (N.D.Cal. 1972) 354 F.Supp. 61, 76-77, affirmed (9 Cir. 1975) 513 F.2d 1226. The court found that the prefix did not obviate any potential confusion; "rather it is a significant source of such confusion" (id., p. 77).

Defendants' use of "Olympic" after they had been notified of plaintiffs' exclusive rights indicates that the confusion issue should be decided in plaintiffs' favor:

> "When the alleged infringer knowingly adopts a mark similar to another's, reviewing courts presume that the defendant can accomplish his purpose: that is, that the public will be deceived (*AMF, Inc.* v. *Sleekcraft Boats*, supra, 599 F.2d 354).

Dr. Waddell's own declaration notes that as far back as mid-1981 he learned that he could not use the term "Olympic" in SFAA's corporate name (Waddell Decl., pp. 4-5). Dr. Waddell's assertion that he did not believe SFAA was prevented from using "Olympic" in connection with SFAA's activities is belied by his December 26, 1981 letter to USOC requesting permission to use Olympic terminology (Miller Aff., Exh. B). Throughout the communications that fol-

lowed, plaintiffs consistently asserted their exclusive right to Olympic terminology (Miller Aff., Exhs. D, F, H; Kline Decl., Exhs. B, D). Yet defendants resumed their use of Olympic terminolgy in full knowledge of these facts (Waddell Decl., pp. 4-7). Under the rule set forth in *AMF*, defendants are precluded from arguing that no confusion exists.

III. DEFENDANTS HAVE NO FIRST AMENDMENT RIGHT TO INFRINGE PLAINTIFFS' MARKS.

Defendants erroneously contend that plaintiffs' efforts to enforce their rights to the term "Olympic" constitute a violation of defendants' First Amendment right of free speech. The answer to this contention is that (1) no First Amendment rights are involved here, and (2) no state action is present.

As we argued in our initial memorandum (pp. 12-13), the speech involved in this case is *commercial* in nature and may properly be enjoined by this Court. Plaintiffs are not attempting to enjoin the event, the dissemination of any advertising or conduct of the Gay Games; they are simply asserting the rights granted to them by Congress to control the use of "Olympic." For the reasons cited in our initial memorandum, no constitutional guarantees are infringed by this action.

Indeed, defendants' theory would preclude every trademark or copyright holder from ever making a valid claim of infringement. This is simply not the law:

> "[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed" (*Giboney* v. *Empire Storage Co.* (1949) 336 U.S. 490, 502, quoted with approval in *California Transport* v. *Trucking Unlimited* (1972) 404 U.S. 508, 514).

A second, independent reason for rejecting defendants' claim is that no state action is present. In *DeFrantz* v. *United States Olympic Com.* (D.D.C. 1980) 492 F.Supp. 1181,

various athletes attempted to enjoin the USOC from implementing its resolution, in the wake of the Soviet invasion of Afghanistan, not to send a United States team to the 1980 Summer Olympic Games in Moscow. Plaintiffs claimed, inter alia, that this resolution abridged their constitutional rights. After analyzing the Amateur Sports Act and the nature of the USOC, the court held that no governmental act or "state action" was present (id., pp. 1193-1194). The result can be no different here.

The fact that an injunction is sought from this Court does not transform the activity into state action. Courts have routinely held that judicial protection of property rights such as trademarks and copyrights does not constitute the requisite governmental action for a claim of constitutional infringement (see, e.g., *Interbank Card Ass'n* v. *Simms* (M.D.N.C. 1977) 431 F.Supp. 131, 133). Accordingly, no state action is present here.

IV. DEFENDANTS' CLAIM OF DISCRIMINATORY ENFORCEMENT IS SPECIOUS.

Defendants claim that they are being singled out for "selective enforcement" of plaintiffs' rights, but they offer no probative evidence on this point and have not cited any case establishing this assertion as a defense to this action. Indeed, the applicable rule of law is to the contrary, as is the factual record in this case.

The established rule in trademark law is that an owner "is under no obligation to bring actions against all infringers of its mark in order to preserve its right to bring an action against [the instant defendant]" (*McNeil Laboratories* v. *Am. Home Products Corp.* (D.N.J. 1976) 416 F. Supp 804, 808; see *Fleischmann Distilling Corp.* v. *Maier Brewing Company* (9 Cir. 1963) 314 F.2d 149, 160, certiorari denied (1963) 374 U.S. 830). This Court held that the existence of other infringers "against whom plaintiffs have not instituted legal proceedings is irrelevant to this Court's consideration of whether injunctive relief should issue" (*United States Jaycees* v. *San Francisco Jr. Cham. of Com.* (N.D.Cal. 1972) 354

F.Supp. 61, 73-74, affirmed (9 Cir. 1975) 513 F.2d 1226; see also *Visa International* v. *Bankcard Holders of America* (N.D.Cal. 1981) 211 U.S.P.Q. 28, 40). Accordingly, the existence of outside infringers is no defense to plaintiffs' action.

To the extent that courts are willing to consider the existence of other infringers, they will do so only with respect to the issue of whether outside uses have so diluted the mark that it is no longer entitled to protection, a defense not raised by defendants here (see *Chips 'N Twigs, Inc.* v. *Chip-Chip, Ltd.* (E.D.Pa. 1976) 414 F.Supp. 1003, 1017). The mark owner will be in the clear if it has attempted to protect its mark from "commercially significant" infringements (*Playboy Enterprises, Inc.* v. *Chuckleberry Pub.* (S.D.N.Y. 1980) 486 F.Supp. 414, 423):

> "The owner of a mark is not required to police every conceivably related use—thereby needlessly reducing non-competing commercial activity and encouraging litigation—in order to protect a definable area of primary importance" (id., pp. 422-423).

Thus, Playboy magazine's failure to enforce against Playgirl and other publications outside the "male heterosexual sex-oriented magazine market" did not estop it from enforcement against a competitor called Playmen.

The application of the dilution or abandonment doctrine to this action is doubtful in light of Congress' explicit protection of Olympic terminology and symbols in the Amateur Sports Act. In any event, the record is clear that plaintiffs have vigorously acted to protect Olympic terminology in the "commercially significant" area, including use by commerical enterprises and in human athletic competitions (Rowan Decl., p. 2). Further, defendants' assertion that plaintiffs have not previously brought litigation against an infringing group is flatly untrue (Kline Supp.Decl., pp. 1-2). The fact that plaintiffs have successfully enjoined the "Golden Age Olympics" (id., Exh. J) disposes of defendants' assertion that this lawsuit is the product of bias against

homosexuals. The assertion is irrelevant, as well as untrue. But what makes defendants' conducts here all the more aggravated is that they *knew* of USOC's efforts to police unauthorized use of Olympic terminology and symbols. Dr. Waddell admits that he knew USOC objected to athletic competitions called "Police Olympics" and "Armenian Olympics" (Waddell Decl., pp. 7, 10). Under these circumstances defendants can claim no comfort in the fact that others too may have infringed plaintiffs' rights.

V. THE NATURE OF THE INJURY IS SUFFICIENT TO WARRANT INJUNCTIVE RELIEF.

Defendants argue that plaintiffs have not shown how they will be injured by defendants' infringement of the Olympic terminology and symbols. This argument ignores the reality of trademark infringement cases, where the appropriation itself constitutes the injury for which injunctive relief is appropriate. Creating as it does confusion as to sponsorship and sanctioning, the infringement plainly warrants issuance of an injunction. So too, under section 380(a) the range of statutory protection extends not only to USOC sponsorship but to "any Olympic activity." "Olympic activity"—at a minimum—includes not just The Olympic Games, but the Pan American Games (36 U.S.C. § 374), the Special Olympics for handicapped Americans, the Junior Olympics and the Explorer Olympics for young Americans (Miller Aff., p. 2), plus of course those contests and the pageantry uniquely identified with The Olympic Games.

Courts have uniformly recognized the fact that irreparable injury attends trademark infringement (*Visa International* v. *Bankcard Holders of America* (N.D.Cal. 1981) 211 U.S.P.Q. 28, 38 and cases cited). Because of a name's unique funciton in representing intangible assets like reputaion and good will, "[t]he fact that plaintiff has had the symbol of its reputation placed in the hands of another is irreparable injury" (id., p. 39). As a result of defendants' plain infringement, the requisite irreparable injury has been established here.

But defendants here do more than trade on plaintiffs'

names, reputation and good will. The bulk of the funds used to support United States participation in The Olympic Games and Olympic activities are raised through USOC's authorization and licensing of Olympic terminology and symbols (Miller Aff., p. 1). During the present quadrennium, approximately $40 million will be raised in this manner (id.). Defendants compete directly with that endeavor and authorize use of Gay Olympic terminology to raise funds by endorsements in advertisements (Walker Decl., Exh. B). Defendants hope to raise $250,000 (Waddell Decl., p. 8) in the same and like ways using Olympic terminology and symbols—entertainments (id., p. 9), sales of posters, buttons, t-shirts (Petersen Decl., p. 3), basketball games and musicals (Loberg Decl., p. 2) and the like. The injury to plaintiffs is thus direct *and* irreparable.

VI. DEFENDANTS' APPARENT CLAIM OF LACHES IS UNAVAILING.

Defendants appear to contend that injunctive relief should be denied because plaintiffs have been dilatory in seeking legal redress. The laches argument is without merit.

The equitable defense of laches involves much more than mere delay in instituting legal action. The Ninth Circuit has held that while mere passage of time will not constitute laches:

> "[I]f the passage of time can be shown to have lulled defendant into a false sense of security, and the defendant acts in reliance thereon, laches may, in the discretion of the trial court, be found" (*Friend* v. *H.A. Friend and Company* (9 Cir. 1969) 416 F.2d 526, 533; see *Carl Zeiss Stiftung* v. *Veb Carl Zeiss Jena* (2 Cir. 1970) 433 F.2d 686, 704, certiorari denied (1971) 403 U.S. 905).

In *Golden Door, Inc.* v. *Odisho* (N.D.Cal. 1977) 437 F.Supp. 956, 968, affirmed (9 Cir. 1980) 646 F.2d 347, Judge Schwarzer held that laches requires passage of time plus "inexcusable delay which prejudices the defendant." If the plaintiff is not aware of the facts giving rise to his cause of

action, he will not be barred. Moreover, if the infringement is clear, injunctive relief will not be denied because of laches (but the delay may preclude relief in the form of accounting and damages).

The record in this case shows that the delay, if there was one, was induced by SFAA. On January 18, 1982—after USOC's protest of defendants' use of "Olympic"—Dr. Waddell wrote USOC's executive director: "We have, as an interim measure, blocked out the term 'Olympic' and in all subsequent printed materials will substitute the term 'Athletic' " (Miller Aff., Exh. E). Although the materials did not come to USOC's attention until later, it appears that defendants did in fact stop using "Olympic" (see Kline Decl., Exh. E—items refer to "Gay *Athletic* Games"), a fact Waddell now concedes (Waddell Decl., p. 7).

Later, on January 26, 1982, Dr. Waddell wrote a more comprehensive letter outlining SFAA's position, but still indicated:

> "Until this controversy can be definitively resolved, we of San Francisco Arts and Athletics, Inc., are making every reasonable effort temporarily to *suspend and avoid use* of the term 'Olympic' in our non-profit organization's activities to promote and plan the Games" (Miller Aff., Exh. G).

Interestingly, the Waddell January 26 letter goes on: "A definitive resolution of this controversy about our use of the term 'Olympic' is *urgently needed* by us" (emphasis in original). Waddell then threatened legal action if an informal resolution could not be worked out (Miller Aff., Exh. I, p. 2). USOC refused to concede (Kline Decl., Exh. B). SFAA's lawyer, Mary Dunlap, followed up with a letter denying any agreement to stop use of "Olympic" and claiming that enforcement of the Amateur Sports Act against SFAA would work "gross abridgments of the First Amendment" (Kline Decl., Exh. C). Ms. Dunlap also claimed that USOC and its officers were acting "under color of federal law" and denying SFAA Fifth Amendment equal protection rights.

But Ms. Dunlap made an offer in settlement to footnote all "Gay Olympics" materials as not associated with USOC (Kline Aff., Exh. C). USOC responded through its counsellor Mr. Kline that Ms. Dunlap's proposal was unacceptable and stating that it regarded SFAA as bound by the prior agreement of Dr. Waddell not to use Olympic terminology and symbols. There matters stood until USOC learned in early June that SFAA had resumed use of "Gay *Olympic* Games" (Miller Aff., p. 5).

The record reveals that plaintiffs have at all times asserted their exclusive rights in the protected terms and marks. This case thus differs from those where defendants have been lulled into a false sense of security by a plaintiff's silence or tacit consent to a mark's use. The delay, if any, was in bringing the matter to litigation; but it was occasioned by defendants' apparent decision to stop using the term. No facts indicated that plaintiffs acquiesced, expressly or implicity, in defendants' use of the term "Olympic." Accordingly, defendants' laches claim must fail. Indeed, defendants knew that plaintiffs object not only to defendants' unauthorized usages of Olympic terminology and symbols but to other unauthorized usages as well (Waddell Decl., pp. 7, 10).

CONCLUSION.

For the foregoing reasons, and for the reasons set forth in our Memorandum in Support of a Temporary Restraining Order, plaintiffs' request for a preliminary injunction should be granted.

Dated: August 18, 1982.

(Names omitted in printing.)

By: Robert A. Gordon (Signed)
Attorneys for Plaintiffs
International Olympic Committee and
United States Olympic Committee

(Certificates of Service omitted in printing.)

File Date: August 19, 1982

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

INTERNATIONAL OLYMPIC COMMITTEE, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF SWITZERLAND; UNITED STATES OLYMPIC COMMITTEE, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE UNITED STATES OF AMERICA,

PLAINTIFFS,

VS.

SAN FRANCISCO ARTS & ATHLETICS, A CALIFORNIA CORPORATION; THOMAS F. WADDELL,

DEFENDANTS.

Hearing on Preliminary Injunction:
Reporter's Transcript of Proceedings
Thursday, August 19, 1982
Reported by: Robert L. Rogers, CSR

APPEARANCES

For the Plaintiff:

Pillsbury, Madison & Sutro
225 Bush Street
P. O. Box 7880
San Francisco, CA 94120

By: Vaughn R. Walker, Esq.; Robert Gordon, Esq.

Beveridge, De Grandi & Kline 1819 H. Street N.W.
Washington, D.C. 20006

By: Richard G. Kline, Esq.

For Defendants:
Mary C. Dunlap, Esq.
425 Staples Ave.
San Francisco, CA 94112

August 19, 1982

The Clerk: C-82-4183 International Olympic Committee, et al., versus San Francisco Arts & Athletics, a California corporation, et al., for hearing on Plaintiffs' Motion for Preliminary Injuction.

Will counsel state their appearance to the Court for the record.

Ms. Dunlap: Mary Dunlap for the Defendant, and Dr. Thomas Waddell.

Mr. Walker: I'm Ron Walker for the Plaintiffs. This is my assistant, Robert Gordon, and Mr. Richard Kline of the Washington, D.C., bar.

The Court: You are the moving party.

Mr. Walker: That is correct, your Honor. This is, as you know —

The Court: Did you call the case?

The Clerk: Yes, I did.

Mr. Walker: As your Honor is fully aware, this is before your Honor on an Order to Show Cause re Preliminary Injunction. The Order to Show Cause was issued by Judge Conti 10 days ago, and in so doing Judge Conti had lengthy proceedings, unusually lengthy, I believe, for a temporary restraining order proceedings. I requested and obtained a transcript of those proceedings. I belive Ms. Dunlap did as well. I don't know if those have been made available to the Court, but I would submit those to your Honor.

Both parties were heard at length before Judge Conti, and he determined to issue the TRO. Since that time, your Honor, we don't believe that anything has been shown by the responding parties to suggest why a preliminary injunction should not issue in this matter. Nothing new to preclude —

The Court: Now, as I understand it, you seek to restrain the use of the name. You don't seek to restrain the actual performance or exhibition of competition.

Mr. Walker: That is correct, your Honor.

The Court: There was a suggestion in some of the papers filed that the declarant might have been under the impression that you were seeking to prohibit the competition — the performance.

Mr. Walker: Not at all. Our interest is solely in what we regard as the unauthorized use of Olympic terminology and Olympic symbols. We have no interest in stopping the Games, in hindering the Games in any way.

In fact, when we first learned of the Games, the executive director of the U.S. Olympic Committee believed that he had forestalled the use of "Olympics," and having done so, wished Dr. Waddell, who is the organizer of the Games, well and gave him best wishes for success in the Games.

So we think that's very important in balancing the equities which your Honor has to do in considering whether to issue a preliminary injunction. The objectives which the Defendants seek to foster by these Games, that is, to demonstrat that homosexual people can participate and do participate fully and well in athletic events, it's an effort to bring dignity to the gay community. None of that will be interfered with by any of the relief that we are seeking from your Honor this morning on the preliminary injunction. We seek simply to stop the unauthorized use of "Olympic" and the Olympic symbols.

The Court: Let's look at the statute. I take it that you bring this action under Section 380(A)(4)?

Mr. Walker: That is correct, your Honor.

The Court: And with respect to the showing as to the word "Olympic," to cause mistake, tending to cause — Well, let's read it:

"Without the consent of the corporation, any person who uses, to promote any athletic performance or competition, the words "Olympic," or any combination or simulation

The Court *(cont.)*: thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the corporation or any Olympic activity shall be subject to a suit."

What is the showing that there is a likelihood to cause mistake or to suggest a connection with the Olympic activity?

Mr. Walker: First, let me point out, your Honor, that the showing under Section 380 is not "likely to confuse," but "tending to cause confusion." It is the same showing that exist under Section 1125 of the Lanham Act. It is a more relaxed showing than is typically the case in a trademark infringement action — tending to show confusion, mistake or deception. And the confusion and deception and mistake is with not only the activities of the United States Olympic Committee, but with any Olympic activity. And in the record, your Honor, it is noted that among the Olympic Activities of the United States Olympic Committee are the Special Olympics for handicapped people, the Junior Olympics for young people, the Explorer Olympics, the Olympic Trials. There are a variety of Olympic events which are qualified by some word either in front of them or in connection with them. And so simply saying "Gay Olympics" does not distinguish the activities of the defendants in any way from the activities of the United States Olympic Committee.

The Court: Well, with respect to those others, did your organization give permission?

Mr. Walker: We give permission. In fact, with the ones I mentioned, we are sponsors of them. The Special Olympics is part of the Olympic program.

The Court: And under the statute you can do that?

Mr. Walker: Under the statute we are required to do that with respect to the Special Olympics for handicapped persons.

The Court: So that was written into the Act?

Mr. Walker: That was written into the Act. We are fulfilling the statutory mandate by conducting a Special

***Mr. Walker** (cont.):* Olympics, as is indicated in Mr. Miller's declaration. Likewise, with the Junior Olympics and the Explorer Olympics, they are all part of the same program.

Now, with regard also to confusion, I think it is fair to point out that the defendants have represented that the only time they have used Olympic terminology is in connection with the word "Gay." They make that statement in their Memorandum. But, your Honor, there are numerous instances in the material that we have presented which demonstrate references by the defendants simply to "Olympics."

For example, in Exhibit C to Mr. Miller's Affidavit, which is a newsletter of the defendants, there is reference to the Olympic emblem, the first Olympic poster, Olympic T-shirt package, official Olympic T-shirt, "Diving in the Olympic Games depends upon us being able to acquire use of the San Francisco University pool," special Olympic Games benefits, the Olympic Committee, Olympic Flag Corps, Olympic Headquarters, the Olympic office. And by those references they are meaning the defendant's headquarters on Castro Street. So they have not limited their use of Olympics simply in connection with the word "Gay."

But even if they were to do so, there is still confusion and the possibility of a mistaken association or identification with the activites of the U.S.O.C. One other thing I want to point out —

The Court: Let's focus for a moment on the element of irreparable harm. Perhaps you should finish your point.

Mr. Walker: I want to make one other point with reference to Section 380. It is not simply confusion and mistake. There is also the element of deceit. And there is the principle in trademark law, which the Ninth Circuit outlined in a case entitled *AMF, Inc., versus Sleek Craft Boats*, which is reported at 599 Fed. 2d. 341, your Honor. And it has to do with the matter of intent. And the principle is stated rather succinctly by the Court. Let me just read it.

Mr. Walker *(cont.)*: "When the alleged infringer knowingly adopts a mark similar to another's, reviewing courts presume that the defendant can accomplish his purpose, that is, that the public will be deceived."

Now, I direct your Honor's attention to Dr. Waddell's own declaration in which he states that when San Francisco Arts & Athletics, the corporate defendant, sought to register with the Secretary of State back in the middle of 1981, it was told by the Secretary of State of California that it could not use the word "Olympic" in its corporate name as it had intended to do. He said, "Well, we went on and thought we could use it in our activities." But that came to light to the U.S.O.C., and immediately the U.S.O.C. asked the defendants to refrain from the use of "Olympics." There was an exchange of correspondence. This is all set out in the declarations, including Dr. Waddell's declaration.

Nonetheless, the defendants persisted, even though at one point they agreed to drop the use of "Olympics." And they did so. They printed materials, as he now admits, for a time in connection with their activities dropping any reference to "Olympics." When the lawyers got involved, they resumed the use of it.

We believe, your Honor, this indicates the kind of intentional infringement to which the Ninth Circuit addressed themselves in the *AMF* case, and it is another basis upon which that part, the deceit part, of Section 380 should apply here.

Now, your Honor asked about irreparable injury. As Mr. Miller explains in his affidavit, your Honor, the life blood of the U.S. Olympic Committee is through corporate authorizations and licensing of our trade name, "Olympic," as well as the Olympic symbol. I could present to you, your Honor, numerous instances where the Olympic symbol, the five rings, the Olympic torch, or the name "Olympic," has been used as a fund raising device. During the current four-year period the United States Olympic Committee expects to raise forty million dollars, the bulk of its income, to support

Mr. Walker *(cont.)*: United States' participation in the Olympic Games. If the U.S.O.C. permits unauthorized use, such as the kind we have here today, it completely diminishes and destroys the value of the authorizations and licensings which the U.S.O.C. makes to corporations for use of the Olympic terminology and symbols. And without that, the funds necessary to support American athletes in the Olympic Games cannot go forward — would not be raised.

By contrast, as we indicated at the outset, we are not seeking to stop the defendants in any way from conducting their activities. They can go on and conduct their games in the manner in which they decide is most suitable to their purposes. All we ask is that they refrain from the use of Olympic terminology and symbols.

The Court: Thank you.

Ms. Dunlap.

Ms. Dunlap: Your Honor, first of all, I'd like to politely register a protest. Among Judge Conti's orders made in conjunction with the termporary restraining order was an order that the plaintiffs would serve all of their papers last Tuesday, the 10th. We would serve our opposition on Monday. My doorstep has been covered with papers, it would seem, ever since, including supplemental declarations filed by the plaintiffs on Monday, and a memorandum in reply to our legal points and authorities served at six p.m. last evening. Even so, the content of all of this paper filed by these plaintiffs fails to show the Court, (1) that there is any likelihood of proving that these defendants have violated either the Amateur Sports Act in its protection of the word "Olympic," or the trademark law and the antidilution law, also relied upon by the plaintiffs.

It appears that what the plaintiffs ask this Court to do is assume that the use of "Olympic" in conjunction with an athletic activity per se violates the Amateur Sports Act and Section 380, in particular. Had that been the purpose of Congress, Congress would not have used the language, "tending to confuse, to cause mistake, to deceive," and so

Ms. Dunlap *(cont.)*: forth. There would have been no need, for it would have been the purpose of Congress simply to bestow upon the U.S. Olympic Committee an absolute entitlement to the term.

I would submit that such an act on the part of Congress would on the face of it have been subject to considerable challenge based on the First Amendment. Instead, Congress carefully tailored the test in Section 380 to correspond to that balance within trademark law that requires a showing of confusion, mistake, or deceit in order to prevent a so-called infringer from using a word.

The record may be somewhat confused on this point, but I would like to clarify something. The defendants in this case at no stage have used any symbol, emblem, insignia, trademark, or name, other than the word "Olympic" in the context of the Gay Olympic Games. Counsel's point about various references to Olympic offices and so on is not well taken.

If your Honor will look at the very documents and exhibits pointed out by counsel, each and every one of them contains the word "Olympic" in the context of the Gay Games, and with recitals of the political and philosophical purposes of this organization in promoting those Games in its nonprofit capacity.

Counsel has also failed once again to respond to the point that Judge Cannella did have an opportunity in the *S.T.O.P.* case to interpret the meaning of the Amateur Sports Act and of Section 380 in particular. Judge Cannella made the point there, and made it plainly, that the purpose of that section was to prevent others from seeking to register "Olympic" as a trademark. There has been no proffered registration of Olympic as a trademark in the case at bar.

Moreover, the point made by Mr. Kline's supplemental declaration on Monday that an organization using the word "Golden Age Olympics" has somehow been enjoined by the U.S. Olympic Committee must be more carefully scrutinized in light of the submission of Mr. Kline in that regard. One

***Ms. Dunlap** (cont.):* discovers, in looking at the exhibit to which he refers, that what happened was a consent decree growing out of the Golden Age Olympics' effort to register "Olympic" as a trademark. It was Congress' intent, as Judge Cannella interpreted it in the *S.T.O.P.* case, to prevent such registrations. There is no registration issue in the case at bar. There has been no effort by these defendants in any way to step upon Congress' intent to permit the U.S. Olympic Commitee to maintain the exclusive registration, after September, 1950, to the word "Olympic." Rather here the word "Olympic" has been used in the course of promotion of athletic competition in a manner that these plaintiffs have at no point shown, or made a suggestion of showing, confuses or tends to confuse, tends to cause mistake, tends to deceive.

Let me make one observation about this business of deceit. The word "deceit" must have some meaning. The word "deceit," as I understand it, means to try to fool or falsely persuade someone. There is not one iota of evidence in this record, nor will there ever be, that these defendants have somehow set out to deceive the world, to suggest falsely that they are in some fashion related to the U.S. Olympic Commitee.

In their reply memorandum yesterday the plaintiffs cite a case in the Ninth Circuit, to which I want to draw the Court's attention, for the point that the use of the term "Gay" in conjunction with the use of the term "Olympic" does not sufficiently distinguish that use from the U.S. Olympic Committee's protected uses. That case, which is *U.S.J.C.'s versus San Francisco Junior Chamber of Commerce*, involved, as I read it this morning, a disaffiliated subgroup of the United States Junior Chambers of Commerce who had, after not paying dues and departed in its philosophy from the parent organization, decided, nonetheless, to keep its name. The Court found, in fact, that there was confusion in the public's mind. That fact was based, in part, on the pre-existing relationship between the plaintiff and the defendant.

Ms. Dunlap *(cont.)*: The Court also found, unlike the case at bar, I submit, that the phrase "Junior Chamber of Commerce" is not a generic or descriptive term.

I would contrast here the ancient Greek history of the term "Olympic" in terms of its having preceded Congress' actions with relation to the U.S. Olympic Committee by thousands of years. So the *J.C.*'s case cited by plaintiffs here, in lieu of a showing of confusion as a legal point, perhaps doesn't even stand for the proposition for which it is cited in their brief.

Onward from the law and from the statutory misinterpretation of that law and misapplication of that law that defendants believe is being urged upon this Court, if the Court were to accept the position of the plaintiffs that they have an absolute entitlement to the use of the term "Olympic," regardless of the nature of an organization that might use it, regardless of the lack of confusion, regardless of the nonprofit and political nature of that organization's activities, if this Court were to accept that interpretation, then the very constitutional issues which were avoided in the *S.T.O.P.* case would have to be decided. And we submit that the matter of an injunction in this case, imposing what amounts to a prior restraint upon the use of the term "Olympic," is no small matter, constitutionally speaking. It cannot be disposed of in a footnote or a slight reference to the proposition that in most trademark cases the action of issuing an injunction is not government action. Here we have an entity bestowed by Congress with powers that are substantial over other organizations, given the opportunity to use the public domain for the raising of funds and the seeking of public resources.

The action of a court in enjoining the use of a word in this context is an action which can only be described as governmental action pursuant to the First Amendment. The argument of the plaintiffs here as to injury at all points presume this tendency to confuse, presume the misappropriation of goodwill, and in no part of these many declarations filed over a period of a week and a half, in no part is any

***Ms. Dunlap** (cont.):* effort made to make the requisite statutory showing under the Amateur Sports Act. The reply memorandum of the plaintiffs in this case argues that the defendants here have not shown, nor even suggested in any strong or convincing way, that there has been discriminatory enforcement. I submit to the Court that Dr. Waddell's affidavit establishing the long run and international nature of the Police Olympics, which is known to these plaintiffs, which has been conducted, if you will, under their noses for years, points up in a strong way, in a clear way, that there has been a selection of targets in this litigation.

Whether the plaintiffs in this case seek to have this Court presume confusion for purposes of using this injunction in other litigation, or whether, on the other hand, these plaintiffs intend never to sue any other athletic competition for the use of the term "Olympics," their legal and factual test for injunctive relief do not correspond with the statute and with the showings required in this Circuit for the issuance of an injunction.

The injury, I submit, is not shown of record and is only capable of being found if the Court presumes the legal violation as to which these plaintiffs have not made a showing. Meanwhile, on the other side of the scales tipping toward the floor is the injury to these defendants, which is massively documented in the declarations submitted on Monday. The harm to them consists of far more than having to cross out a word on a T-shirt, or a poster, or a button. It consists, in part, in the hand of the law reaching into these activities of these individuals and stripping away from them the ability to use a word that, we submit, is in the public domain, is generic and is descriptive.

The harm to the public interest, I submit, is even greater because in this case the U.S. Olympic Committee, if it were to receive injunctive relief, will have sidestepped legal tests, failed to make factual showings, undermined the legal rigors of a motion for preliminary injunction in terms of the showings required to be made and will have deprived the

***Ms. Dunlap** (cont.):* public of the kind of careful balancing between a meaning of a trademark law and the meaning of First Amendment rights that the federal forum requires.

The Court: Thank you very much.

Do you desire to reply?

Mr. Walker: Very briefly, if I might, your Honor.

First of all, with respect to Ms. Dunlap's First Amendment point, the First Amendment does not preclude the copyright laws; it doesn't preclude the trademark laws; it doesn't preclude antitrust laws or securities law violations. All of this conduct is carried out by speech. It's commercial speech and it can be regulated, I submit, at this point —

The Court: She argues that there is a generic term and that Congres has attempted to give you exclusive use of that term.

Mr. Walker: She is arguing, I gather, that the statute is unconstitutional.

The Court: Yes.

Mr. Walker: The statute has been in effect, or rather the U.S. Olympic Committee's right to use Olympic and Olympic terminology and symbols has been in effect since 1950.

The Court: The statute was enacted in 1950.

Mr. Walker: The right of the U.S.O.C. was enacted in 1950, and then it was amended in 1978 by the Amateur Sports Act of 1978. From its initial enactment in 1950, it was a criminal violation to use Olympic terminology and symbols. And that was changed in 1978 to provide a right of action in the United States Olympic Committee under the Lanham Act. The violation is set forth in the Amateur Sports Act, but the U.S.O.C. is given the remedies under the Lanham Act, the Trademark Act.

We don't think, your Honor, that this is unconstitutional in any way. The Court addressed that, to the extent I think any Court has addressed it, in the *De Franz* case, which is cited in our papers and is referred to by Ms. Dunlap. There the issue was whether there was unconstitutional infringement of rights of athletes to participate in the 1980 Summer

***Mr. Walker** (cont.)*: Games at Moscow when the U.S.O.C. decided to not send a U.S. team. The athletes charged that the U.S.O.C. didn't have that authority; that it was an unconstitutional infringement of their right to participate in the Games. And the Court had no difficulty in disposing of the constitutional challenge to the Amateur Sports Act in that context.

Now, I grant you that challenge was a somewhat different one in a different context, but the same arguments of state action were raised in the *De Franz* case that Ms. Dunlap raises here.

Regarding the generic nature of the term, the term "Olympics" has been around for a long time, but generic words can acquire trademark significance. There has been nothing unconstitutional about that. It depends upon usage. And here we have a situation where Congress decided that the use of Olympics had become so indelibly interlinked in the public's mind with the Olympic Games and the activities related thereto, that it ought to afford to the United States Olympic Committee the trademark remedies, which it gave them in the Amateur Sports Act.

Ms. Dunlap made some point about the lack of evidence, confusion, or mistake. As your Honor knows, evidence of actual confusion in a trademark case is not necessary. It often cannot be brought to court. It is difficult to prove, in any event. What is emphasized by the courts are the similarity between the goods, the similarity of the activities in the markets in which they operate. We are dealing here with activities of the defendants which bear a very, very strong resemblance to the activities of the plaintiffs.

The defendants plan to put on a quadrennial event, one every four years. They include athletic events which are the Olympic sports — swimming, diving, wrestling, volley ball, basketball, many others. The Games are international in scope. Even their literature say they expect individuals from 12 countries, many cities. The Games are going to be started by the lighting of an Olympic torch, which is being carried

Mr. Walker *(cont.)*: across the country. The Games and events are nonprofit activities, as, indeed, are the activities of the United States Olympic Committee. The opening ceremonies employ Olympic flag corps. In fact, the schedule, which is attached as Exhibit A to Ms. Dunlap's declaration, bears a very strong resemblance to the opening ceremonies of the Olympic Games. And, finally, there is one point on which erroneously the defendants try to distinguish the purpose of their events from the Olympic Games. Dr. Waddell in his declaration states of page 3:

> "We have an entirely different philosophy than the traditional Olympic Games in that we are emphasizing participation and cooperation and recreational competition as opposed to emphasizing winning and nationalism."

Well, Dr. Waddell participated in the 1968 Games at Mexico City, and he perhaps heard the Olympic Creed which was laid down by the founder of the modern Olympics in 1894, Baron de Courtin. He said, in words bearing a striking resemblance to the words enunciated by Dr. Wardell:

> "The most important thing in the Olympic Games is not to win, but to take part; just as the most important thing in life is not to triumph, but to struggle."

So even the declared purposes of these Games bear a striking resemblance to the Olympic Creed, your Honor. And the use, therefore, of Olympic terminology and Olympic symbols in their connection, we believe, is ample evidence of confusion and possible misidentification with the activities of the plaintiffs.

The Court: All right. Anything further? Does the matter stand submitted?

Ms. Dunlap: We have a number of items here that were too bulky to be submitted as exhibits. They are not documentary in nature. I wish to show them to counsel for the plaintiffs, and then submit them to the Court for its safe keeping. They seem to be our only copies of these particular items.

Mr. Walker: We have others as well, your Honor.

The Court: Those are the official —

Ms. Dunlap: The shirts and patch are shirts and a patch from Olympic Games conducted, respectively, by the police and the Armenians referred to in Dr. Waddell's affidavit. These posters are all the various posters produced for and on behalf of the Olympic Games. So your Honor will see what is being used and what isn't being used by way of supposedly similar symbols, insignias, and so on. That's our purpose for submitting them.

Mr. Walker: Let me just address that, if I might, for the record, and that is simply this: The evidence of other infringements is not any defense to a trademark action at all. The fact that others may have infringed on our mark doesn't help the defendants one whip. But, secondly, our affidavits show very conclusively that the plaintiffs have been very vigilant in policing their marks. Our papers and declarations show that there have been 200 and some commercial applications which the U.S. Olympic Committee has pursued. There have been 15 instances of athletic competitions in which we have sought to refrain — caused the parties to refrain from use of Olympic terminology, including the Police Olympics and the Senior Olympics, both of which are presently pending matters.

Mr. Kline refers in his declaration to the action which was brought and the injunction obtained against the Golden Age Olympics involving athletic contests for older people. So, they are wrong, first, on the law, and they are wrong, secondly, on the facts. We have been vigilant.

The Court: Did you say there is an action pending with respect to the Police Olympics?

Mr. Walker: There is not a legal action pending. That's a matter —

(Laughter from the audience.)

The Court: Just a moment. I'll have to clear the Courtroom if you insist on this behavior. Go ahead.

Mr. Walker: There are negotiations between the Senior

Mr. Walker *(cont.):* Olympics people and the Police Olympics people. There has been a successful infringement action brought against a group that was sponsoring something called the Golden Age Olympics.

The Court: That's the consent decree?

Mr. Walker: That is the consent decree, that's correct. So we have been vigilant in policing this mark. And the claim of discrimination here just doesn't hold up, your Honor.

Ms. Dunlap: Your honor, I would only ask that, in light of the fact that my clients are currently the subjects of a temporary restraining order, that we get some sense from the Court as to the Court's will in deciding these issues and this motion.

The Court: You will. It will be decided by noon tomorrow. The matter will be taken under submission.

Mr. Walker: May I ask, your Honor: Can I assume that the temporary restraining order is in effect until —

The Court: Yes, until tomorrow at noon.

Ms. Dunlap: Does your Honor wish us to appear at noon tomorrow?

The Court: No, I don't think that will be necessary.

Mr. Walker: Do you want proposed orders or proposed suggested findings, or anything of that character?

The Court: We may ask for that if we feel it is necessary. Thank you.

(Proceedings adjourned.)

(Reporter's certificate omitted in printing.)

File Date: August 20, 1982

INTERNATIONAL OLYMPIC COMMITTEE,
UNITED STATES OLYMPIC COMMITTEE,

Plaintiff(s),

vs.

SAN FRANCISCO ARTS & ATHLETICS,
THOMAS F. WADDELL,

Defendant(s).

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

C-82-4183 RFP

Order

This matter having been submitted to the Court for consideration and decision on the record and pleadings on file,

IT IS HEREBY ADJUDGED that plaintiffs' motion for preliminary injunction is GRANTED. Memorandum of Findings of Fact and Conclusions of Law to follow.

DATED: August 20, 1982

Robert F. Peckham (Signed)
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Order issued August 20, 1982

The order granting preliminary injunction is reprinted as Appendix 8, pages 91-127, of the Petition for Certiorari. (Note: That order is miscaptioned "United States Court of Appeals for the Ninth Circuit." It should be captioned "United States District Court for the Norther.. District of California.")

File Date: August 23, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Notice of Appeal

Pursuant to Rule 3 (a) of the Federal Rules of Appellate Procedure and 28 U.S. Code section 1292 (a)(1), notice is here by given that defendants SAN FRANCISCO ARTS & ATHLETICS INC. and DR. THOMAS WADDELL appeal from the preliminary injunction ordered by the U.S. District Court for the Northern District of California on August 20, 1982 in the above-captioned action.

Dated: August 23rd 1982

By: Mary C. Dunlap (Signed)
An Attorney for Defendants

File Date: August 23, 1982

(Names omitted, See J.A. 62, above)

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

(Title omitted.)

Defendants' Memorandum of Points and Authorities in Support of Emergency Motion for Order Staying or Dissolving Preliminary Injunction

I. INTRODUCTION

Where the court issuing a preliminary injunction relies upon an erroneous legal premise, or abuses its discretion, in issuing said injunction, the order is subject to being overturned on appeal. *Miss Universe Inc. v. Flesher*, 605 F.2d 1130, 1132-1133 and n.5 (9th Cir. 1979). In the instant case, defendants SAN FRANCISCO ARTS & ATHLETICS INC. (below, SFAA) and DR. THOMAS WADDELL (below, DR. WADDELL) contend that the District Court clearly erred in interpreting and applying relevant federal law, created unnecessary and serious constitutional abridgements of First Amendment rights by said misinterpretation of law, accomplished an invidious discrimination against a non-profit corporation and a volunteer working to overcome discrimination against gay and lesbian persons, and went outside the record in order to find "facts" to support the issuance of a preliminary injunction, after plaintiffs had *failed of record* to show (1.) that defendants were acting in violation of plaintiffs' statutory rights and (2.) that plaintiffs had not discriminated against defendants' "GAY OLYMPIC GAMES", while insulating others including the international "POLICE OLYMPICS" from similar litigative assault.

Defendants respectfully urge this Court to refer to the Memorandum of Defendants in Opposition to Plaintiffs'

Motion for Preliminary Injunction etc., filed below, that is "Exhibit B" to the Declaration of Mary C. Dunlap filed herewith, in support of this motion for an order staying or dissolving the preliminary injunction. Said Exhibit B contains extensive and complete legal analysis of the several points that are briefly summarized in this urgently prepared memorandum.

II. THE DISTRICT COURT ADOPTED ERRONEOUS LEGAL PREMISES IN INTERPRETING AND APPLYING THE AMATEUR SPORTS ACT OF 1978, 36 U.S. CODE SECTION 380(a)(4), TO DEFENDANTS AT BAR.

The portion of the Amateur Sports Act upon which plaintiffs relied below for their motion for preliminary injunction prohibits use by persons in trade, for sales, or in promotion of athletic performances of:

> "the words 'Olympic', 'Olympiad', 'Citius Altius Fortius', or any combination or simulation thereof *tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity* . . .". 36 U.S. Code sec.380(a)(4). (emphasis added)

Plaintiffs below made *no showing* that defendants' use of the word "Olympic" in connection with the Gay Games tended or would tend to cause such confusion, mistake, deception or false suggestion. The only material presented in support of this point by USOC and IOC was a declaration of these plaintiffs' attorney, Mr. Vaughn Walker, baldly claiming the conclusion that defendants' use of "Olympic" in connection with the Gay Games did or would tend to cause such confusion, mistake, deception or false suggestion.

Yet the District Court found that plaintiffs in this action were likely to succeed on the merits of their unsupported claim for relief under 36 U.S. Code section 380(a)(4), by designing a presumption in plaintiffs' favor to that end. The District Court concluded:

> "...under the circumstances of this case, the court *may*

> *presume* that defendants' actions tend to cause confusion and mistake and tend to suggest falsely a connection between their athletic games and those of the USOC."
>
> (Exhibit A to Decl. M. Dunlap, p. 11 lines 7-10).
>
> (emphasis added).

Nothing in the statute empowered such a presumption. Nor does the relevant legislative history, reflecting a narrow Congressional purpose to prevent competitors from registering trademarks and tradenames with the term "Olympic" in them and undermining USOC's ability to sell its name and mark to raise money for Olympic activities, lend an iota of support to the legal presumption of confusion engrafted by the District Court, in favor of plaintiffs, in the order made below. See 36 U.S. Code sections 371 et seq.; House Report No. 95-1627, in U.S. Code Cong. & Admin. News pp. 7483, 7488, 7496 (1978); *see also*, discussion of legislative history of section 380 in *Stop the Olympic Prison v. U.S.O.C*, 489 F. Supp. 1112, 1119-1120 (S.D.N.Y. 1980).

In applying this legally unsupported presumption against defendants below, the District Court stated that

> "[b]ecause the analysis must necessarily be heavily factually oriented, the decision whether [to presume tendency to confuse etc.] must be made on a case by case basis."
>
> (Exhibit A to Decl. Dunlap, p. 11 lines 17-18).

But there was no "heavily factually oriented analysis" in the case at bar nor can the District Court have accomplished any such analysis, because plaintiffs at bar adduced *no facts* whatsoever showing a tendency to confuse, cause mistake, deceive or falsely suggest a relationship on defendants' part.

To the contrary, the District Court in the case at bar *reached beyond the record* to conclude that "...the long range goals of [SFAA and DR. WADDELL] is apparently to sever the games from their direct conection with the gay community altogether." (Exhibit A to Decl. Dunlap, p. 9 lines 19-21). For this erroneous and unsubstantiated

proposition, which is contradicted of record by the Declaration of Thomas Waddell filed in opposition to the motion for preliminary injunction (copy lodged with this Court), the District Court quoted and relied on an article from the San Francisco Chronicle that purported to paraphrase and quote Dr. Waddell. (Exhibit A to Decl.Dunlap, p. 9, lines 22-32). Dr. Waddell's own lengthy and distinct declaration under penalty of perjury, describing the distinct origin, nature, format and philosophy of the proposed "GAY OLYMPIC GAMES", which was in no part rebutted by any showing of plaintiffs, was simply swept aside by the District Court, in favor of an erroneous inference built upon an unverified newspaper article.

In *presuming* that the proposed "GAY OLYMPIC GAMES" label tends to cause confusion, mistake or false suggestion of a relationship with USOC or its activities, the District Court also emphasized that the Gay Games are open to participation by "both homosexuals and heterosexuals", (Exhibit A to Decl.M.Dunlap, p. 9 lines 16-17), and the District Court went on to suggest that if the "participants [were] limited to a special group or groups" (Exhibit A to Decl.M.Dunlap, p. 11 lines 13-14), its presumption as to tendency to confuse etc. might not apply. This part of the reasoning of the District Court is convoluted in the extreme, insofar as it implies that if SFAA and DR. WADDELL had discriminated on account of sexual orientation in defining participation in the Gay Games, or on some other basis, then such discrimination might somehow serve to distinguish the Gay Games from USOC and IOC activities.

According to plaintiffs, "...USOC...has authorized use of 'Olympic' to organizations which sponsor athletic competitions and events for handicapped persons (i.e., 'Special Olympics') and for youth (i.e., 'Junior Olympics' and 'Explorer Olympics')." (Affidavit of F. Don Miller Supp.Mo.T.R.O. etc., filed below and lodged herewith). This undisputed fact makes it difficult to imagine how defendants' narrowing of the group allowed to participate in the Gay

Games would serve to inject doubt into the presumption that the District Court architected against defendants, given that USOC itself has authorized use of 'Olympic' in behalf of those three (3) "special groups".

Moreover, the legal and policy implications of the District Court's reasoning as to "special groups" are untenable. If SFAA and DR. WADDELL did discriminate on account of sexual orientation in the participation criteria for the Gay Games, they would be in putative violation of California's civil rights laws, which have long been held to prohibit such discrimination. See Calif. Civil Code sections 51 et seq., cf. *In re Cox*, 90 Cal. Rptr. 24, 474 P.2d 992, 3 C.3d 205 (1970); Cal. Const. Art I, sec. 1 (guaranteeing a right of privacy against all persons who might invade same). More basically, such discrimination would directly contradict the proclaimed philosophy of SFAA, Dr. Waddell and others sponsoring and promoting the Gay Games, to wit., to overcome discrimination, not to perpetuate it. (See Declarations of Dr. Waddell and of other volunteers lodged herewith, filed below, in opposition to plaintiffs' motion for preliminary injunction etc.).

Furthermore, the openness of the participation policy as to the Gay Games should have served factually to *distinguish* the Games from USOC and IOC activities, given the poignant contrast between this inclusive policy and those organizations' elaborate and judicially cognizable systems of qualifying athletes for Olympic activity. By contrast to plaintiffs' systems of selecting participants in the Olympic Games, the Gay Games are open to any registrant or city team, regardless of prior training, ability or expertise, who desires to compete in the sports/events of billiards, bowling, softball, golf, powerlifting, rugby (women only), wrestling (men only), or in the traditional (Greek) olympic sports. (See Exhibits H and J to Decl.T. Waddell, filed below and lodged herewith).

In summary, the District Court created a presumption of tendency to confuse, etc., which is nowhere supported in law,

and then ignored the record facts in order to apply this judicially engrafted presumption against defendants. The letter and spirit of section 380 of the Amateur Sports Act of 1978 do not support the presumption created below, and the record facts do not afford its logical application against defendants, assuming *arguendo* that such a presumption could be legally justified.

III. THE DISTRICT COURT'S CONSTRUCTION AND APPLICATION OF SECTION 380 OF THE AMATEUR SPORTS ACT OF 1978 UNNECESSARILY CONFLICTS WITH DEFENDANTS' FIRST AMENDMENT RIGHTS OF FREE SPEECH AND ASSOCIATION, AND CREATES A CONSTITUTIONAL CLOUD OVER THE STATUTE ITSELF.

If the District Court had applied 36 U.S. Code section 380 as it was written and Congress intended it to be applied, plaintiffs would have been obligated to show *at least* that they are likely to succeed in their claim that defendants' use of "Olympic" in connection with the Gay Games tends to cause confusion, to cause mistake, to deceive or to falsely suggest a connection with USOC activities. Instead, as discussed above, the District Court created a presumption favoring plaintiffs' claim.

The presumption constitutionally imbalanced section 380, insofar as section 380 crystallized Congress' effort to assure trademark protection to "Olympic" in behalf of USOC while protecting First Amendment rights at the same time. As the District Court in the *Fur Information Case*, cited with approval in *S.T.O.P. v. USOC*, cited supra, 489 F.Supp. at 1125, stated:

> "While Congress may limit [first amendment] rights to prevent fraud, copyright infringement or palming off, *such limitation must be drawn narrowly, so as to meet the perceived evil, without unnecessary impingement on the right of free speech.*"
>
> 364 F,Supp. 16, 22 (S.D.N.Y. 1973), affirmed on other

grounds, 501 F.2d 1048 (2d Cir. 1974); cert. denied, 419 U.S. 1022 (1974).
(emphasis added).

When and after Congress enacted section 380, in 1978, hundreds if not thousands of commercial and other uses of the word "Olympic" existed throughout the world. (See Exhibit B to Decl.M.Dunlap in Opp.Mo.Prelim.Inj., filed below and lodged herewith, showing literally hundreds of uses of "Olympic" as reflected in the telephone pages of several cities and states in the U.S. and major cities in other nations). Moreover, within the United States, the word "Olympic" has been and is being used to promote the international "Police Olympics", the "Armenian Olympics", the "Firemen's Olympics", the "Olympics of Ballet", the "Crab-Cooking Olympics", the "Wrist-Wrestling Olympics", and other theatrical and athletic performances, and the District Court below was presented with extensive physical and documentary evidence by defendants, establishing the existence of all of these uses of the word "Olympic(s)". (See Decl.T.Waddell Opp.Mo.Prelim.Inj. and Appendix I, Exhibits F, Z, BB and EE filed below and lodged herewith).

In light of these uses of "Olympic" around the world, and assuming *arguendo* that Congress was constitutionally and legally free in spite of these uses to bestow a right upon USOC to protect its trademark against competition by enactment of section 380, it is obvious that that right of USOC to protect its trademark must be limited by the express language of section 380(a)(4), where use of the word "Olympic" is concerned, as a First Amendment matter. Otherwise, Congress' action is bestowing the word "Olympic" upon the USOC in spite of the numerous and worldwide pre-existent, simultaneous and subsequent uses of "Olympic" in and out of commerce, and in spite of the generic nature of the term "olympic", would directly contradict the necessarily limiting principles of trademark law, including the "fair use in description" exception contained in the Trademark Act of 1946, 15 U.S. Code section 1115(b)(4), and see, e.g.,

Abercrombie & Fitch v. Hunting World Inc., 537 F.2d 4 (2nd Cir. 1976), which exemption defendants claimed below, and the fundamental rule of trademark law that a word in the public domain by virtue of its generic nature (such as "Olympic") may not necessarily be subject to trademark protection. Defendants submit that those doctrines and principles, which are at the heart of qualifying trademark protection of words as an "exception" to the First Amendment prohibition of Congressional enactments that abridge freedom of speech, cannot be cast aside in the interpretation of section 380. Yet the District Court cast precisely those doctrines aside in interpreting section 380 below to apply to defendants' use of "Olympic" that is challenged by plaintiffs at bar.

Defendants contend that section 380 was not designed to prohibit defendants' nonprofit and political-educational use of the term "Olympic" to describe the events that are scheduled to commence in San Francisco on August 28th, 1982. Defendants submit that the District Court's misreading of section 380 to *presume* a violation of section 380 by defendants, accordingly, has resulted in a classic prior restraint upon defendants' use of a word, "Olympic", accomplished by means of a preliminary injunction the violation of which carries punishment by contempt for use of the word in connection with the Gay Games. (See discussion of "prior restraint" doctrine as applied to this case in Defts.Memo. (Opp.Mo.Prelim.Inj., Ex.B to Decl. M.Dunlap Supp.Mo.Stay, filed herewith, at pp. 13-17 thereof.) This Court certainly need not reach the question of unconstitutionality of section 380 as applied to defendants, in order to perceive and correct the governmentally enforced prohibition of free speech and consequent chilling of protected association that have been accomplished by the preliminary injunction issued below. Defendants and every person associated with them have been ordered by the District Court not to use the word "Olympic" in any connection with the Gay Games, or any other performance(s) sponsored by

defendants, because of interpretation of section 380 of the Amateur Sports Act of 1978 that read out the "tending to cause confusion etc." requirement, as to defendants, by reading in a presumption unsupported by law or by the factual record below.

However, if this Court believes that it does need to reach the issue of the unconstitutionality of section 380 as applied to defendants, then defendants would respectfully submit that insofar as Congress' enactment of section 380 can be held to prohibit use of the word "Olympic(s)" to promote athletic competitions, other than those authorized by USOC, regardless of how disassociated and distinct such competitions are and regardless of the political and educational purposes of such other competitions, that prohibition by Congress would infringe the First Amendment rights of myriad groups to speak and associate, including the rights of defendants and gay/lesbian persons, as well as the rights of Armenians, police, firemen, and firewomen, and other groups that stage and promote their own performances, of athletic and/or theatrical natures, using the term "Olympic(s)" to describe and promote such events. Such a prohibition by Congress would also loft the rights of USOC above those of any trademark holder under the Trademark Act of 1946, with its exceptions for use of words "in good faith to describe to users the goods or services of such party", 15 U.S. Code section 1115(b)(4), and above those of any person or corporation seeking to trademark a generic term. Defendants submit that these implications of a reading of section 380 to exclude such uses of "Olympic" as those of defendants at bar do raise grave First Amendment questions. *Cf. S.T.O.P. v. U.S.O.C.*, cited supra, 489 F.Supp. 1126, see discussion of the sometimes troublesome distinction between "talk for profit and talk for other purposes" in L.Tribe, *American Constitutional Law* 624-628, 655-656 (N.Y. 1978).

IV. THE DISTRICT COURT'S PRELIMINARY INJUNCTION LENDS JUDICIAL CREDENCE TO

BLATANT DISCRIMINATION AGAINST DEFENDANTS BY USOC'S REFUSAL TO AUTHORIZE THE GAY OLYMPIC GAMES AND BY ITS LITIGATIVE ATTACK SINGLY UPON THESE GAMES.

It is undisputed that defendants applied for and were refused permission to use the term "Olympic" by USOC. It is also undisputed that USOC has authorized use of "Olympic" by the sponsors of the "Special Olympics" and the sponsors of the "Junior Olympics" and the "Explorer Olympics". Apparently, plaintiffs interpret their authority under the Amateur Sports Act of 1978 as a whole to be selective in authorizing uses of "Olympic" by amateur athletic organizations. It is noted that the "Special Olympics" find specific authority in the Act. 36 U.S. Code section 374(13). However, there is not any parallel authority for the "Junior Olympics" or for the "Explorer Olympics" and, the District Court's recital to the contrary notwithstanding, there is *nothing* of record establishing that these special olympic-style competitions were "grandfathered in" by USOC via section 380(a). (Exhibit A to Decl.Dunlap, p.17 n.5).

In light of the facts that USOC has selected those events for its imprimatur, while not authorizing the Senior Olympics, the Gay Olympic Games or other amateur athletic competitions, it is plain that USOC claims for itself a power to discriminate in approving or disapproving particular amateur athletic organizations and activities. USOC's refusal to authorize use of "Olympic" by defendants consitituted the first layer of such discrimination as focussed against defendants at bar. This discrimination becomes impossible to explain by reference to the Amateur Sports Act of 1978, to which USOC points to explain its authorization of the "Special Olympics", when the record fact that defendants have designed the Gay Games to afford equal opportunities to women and to members of racial and ethnic minorities is taken into account. Section 374(12) and (14) to Title 36 specifically declares that the purposes of the U.S. Olympic Corporation include *encouragement* of amateur athletic

opportunities for those groups, to wit., women and ethnic/racial minorities. Yet the USOC refused to authorize the Gay Games, in obvious contradiction of that declared purpose and goal of the Corporation.

The second layer of discrimination claimed by defendants in this action has been aimed specifically and consciously at defendants SFAA and DR. WADDELL as representatives of gay/lesbian pride and dignity, and the movement for freedom of this oppressed minority. It was established without dispute below that USOC is and has been aware of the international Police Olympics held in 1982 and previously. (Decl.T.Waddell Opp.Mo. Prelim. Inj. filed below, lodged herewith, at p.10 lines 21-28). Yet no legal action, much less any motion for preliminary injunction, has been filed against the Police Olympics sponsors by USOC.

Again going *outside the record,* the District Court sought to respond to the defendants' contention that the USOC's treatment of them vis à vis the Police Olympics constituted obvious discrimination against the Gay Games' sponsors, by relying on a representation by counsel for plaintiffs made in the course of oral argument to support the Court's finding that:

> "...plaintiffs have indicated to the court at oral argument that a number of other potential lawsuits are in the pre-litigation negotiations stage."
> (Exhibit A to Decl.Dunlap, p.15 lines 6-8).

The District Court's reliance upon counsel's oral representation was entirely improper. The representation is also contradicted by Dr. Waddell's declaration under penalty of perjury. (See Decl.T.Waddell, filed below and lodged herewith, at p. 10 lines 21-28).

Nothing of record contradicts the apparent truth that USOC has singled out the Gay Games as a litigative target under section 380. The other suits cited by the District Court involve either efforts of organizations to register "Olympic" as a competing trademark (in the case of the "Golden Age Olympics", for example), or disputes with affiliated organiza-

tions or with corporations purchasing USOC's trademarked goods. Nor does anything of record contradict the position of defendants that they, unlike the Police Olympics sponsors and the myriad sponsors of other Olympic-style athletic competitions, have been picked on by USOC in this lawsuit. The District Court's failure to weigh this evidence of discrimination in determining the equities of plaintiffs' motion, and in measuring the claims of injury of the parties, constitutes an abuse of equitable discretion of the District Court, particularly in light of the District Court's reaching outside the record to find some material that appeared to contradict the claim of discrimination by defendants.

V. THE PROCEEDINGS BELOW WERE CONDUCTED IN A MANNER THAT WAS NOT EVEN SLIGHTLY EQUITABLE AS FAR AS DEFENDANTS ARE CONCERNED.

As noted above, the District Court in this action reached outside the record at two crucial junctures to "find" material to support its ruling against defendants. Moreover, although plaintiffs were ordered to file and serve their moving papers in support of preliminary injunction on August 10th, 1982, plaintiffs kept on filing papers through August 18th, 1982, the date before the hearing on the said motion. The District Court's order relies in part on supplemental declarations filed by plaintiffs on August 16th, 1982, the date upon which defendants' opposition was due (and was filed and personally served). Counsel for defendants submits, respectfully but with a sense of deep inequity in terms of the plaintiffs' behavior under the rules and the District Court's reaching outside the record, that such procedural treatment of these defendants cannot help but reinforce the sense, based in part upon the facts adduced of record showing discrimination by USOC against these defendants, that SFAA, DR. WADDELL and the others enjoined below have been treated unjustly in this litigation to date. Counsel for defendants further notes in this regard that although the District Court itself found as fact that USOC was aware of defendants' use

of "Olympic" as of May 23, 1982, and although defendants showed that it was likely that USOC knew of defendants' use of "Olympic" in February, 1982, the District Court did not hesitate for a moment to find the requisite "irreparable injury" to plaintiffs, in spite of the record fact that plaintiffs took no legal action against defendants until at a minimum two and one-half (2-1/2) months after the plaintiffs claim the "irreparable injury" to them began, waiting until the eve of the Gay Games to bring their suit. In weighing the equities, and in determining the propriety of a preliminary injunction in the case at bar, defendants contend that the District Court's failure to consider plaintiffs' manipulative timing in deciding the genuineness of their claimed injury constituted an abuse of the District Court's equitable discretion in the premises.

VI. CONCLUSION

Because the District Court's preliminary injunction in the case at bar was founded upon an erroneous interpretation of federal law, combined with "findings" of "fact" not of record and contradicted by showings by defendants, and because the District Court's order unnecessarily abridges the rights of defendants and the public to free speech and association, and because the District Court's order reinforces discrimination against defendants by USOC, defendants respectfully urge this Court to order said preliminary injunction to be stayed pending appeal from said order, so that the irreparable injury to defendants that has already been inflicted by this preliminary injunction and by its predecessor t.r.o. may not be aggravated by silencing defendants and deterring their lawful association in the promotion of the "Gay Olympic Games," set to commence on August 28, 1982.

Dated: 23rd August 1982

Respectfully submitted,
By Mary C. Dunlap (Signed)
An Attorney for Defendants

(Certificate of Service Omitted.)

File Date: August 23, 1982

(Names & caption omitted in printing, See J.A. 5, above)

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Declaration of Mary C. Dunlap in Support of Emergency Motion by Defendants for Order Staying or Dissolving Preliminary Injunction (Fed.R.Civ.P. Rule 62; 9th Cir. Rule 6(h); F.R.A.P. Rule 8(a))

I, MARY C. DUNLAP, do hereby declare under penalty of perjury:

1. I am counsel of record for defendants SAN FRANCISCO ARTS & ATHLETS and DR. THOMAS WADDELL in the above-captioned action, and I am a member in good standing of the Bar of this Court.

2. On August 20th, 1982, at 6:00 o'clock p.m., the Honorable U.S. District Judge Robert F. Peckham of the U.S. District Court for the Northern District of California issued a preliminary injunction against defendants SFAA, DR. WADDELL and others, *inter alia*, ordering these persons not to use the word "Olympic" in connection with the Gay Games, which are an international athletic performance that is scheduled to commence in San Francisco, California, on August 28th, 1982, and that has been designed and sponsored by SFAA, a California non-profit corporation, DR. WADDELL, its volunteer Chairman, and dozens of other persons, in order to educate the public as to the health and normalcy of gay and lesbian persons, and to overcome stereotypes and bigotry as to such persons, and to advance the cause of overcoming discrimination on account of sexual orientation. A copy of the District Court's order granting preliminary injunction is appended to this Declara-

tion, marked "Exhibit A" of this Declaration, and referred to in this Declaration and in the Memorandum in Support of this motion as "Exhibit A" hereof.

3. If the aforesaid preliminary injunction is not immediately stayed by order of this Court, defendants and the public will suffer irreparable and unnecessary injury by means of said preliminary injunction, as follows:

a.) Defendants SFAA and DR. WADDELL and all persons associated as volunteers and participants in the Gay Games will be totally and harmfully deprived of their claimed right to use the word "Olympic" in conjunction with, and to describe, the events of August 28th-September 5, 1982, including but not limited to their claimed right to distribute posters, tee shirts and other paraphernalia containing the phrase "GAY OLYMPIC GAMES", their claimed right to speak of the "GAY OLYMPIC GAMES", and their claimed right to associate in the production and staging of the "GAY OLYMPIC GAMES";

b.) Defendant SFAA, a California non-profit corporation, whose specific corporate purpose as recited in its bylaws is, by means of promoting and supporting public cultural and athletic activities, to "educate the general public on the vitality, variety and versatility of the gay movement", will suffer an incalculable and irreparable diminution of its ability to fulfill that purpose, by means of having been enjoined from using the word, "Olympic", not only as said word appears in the literature, paraphernalia and other materials of SFAA, but also as said word is used orally to describe the Gay Games;

c.) Each of the dozens of volunteers who have been and are laboring to plan, stage, co-ordinate and present the Gay Games, as well as the more than one thousand (1,000) persons who are coming to participate in said Games athtletically, will suffer the irreparable injury of being enjoined by Court order from using the word "Olympic" in any connection with said Games.

4. On August 23, 1982, in the morning, I personally

notified Mr. Vaughn Walker, of Pillsbury Madison & Sutro, attorney for plaintiffs in this action, that I was moving the District Court for a stay of its preliminary injunction, and that, failing said motion, that I was filing this motion in this Court. I personally delivered a copy of all of the moving papers in this matter to the offices of Pillsbury, Madison & Sutro, at 225 Bush Street, San Francisco, California, on August 23, 1982.

5. The instant motion is of an emergency nature, in the definition of Rule 6(h) of the Rules of this Court and of Rule 8(a) of the Federal Rules of Appellate Procedure because, absent an order by this Court staying or dissolving the preliminary injunction, the injuries to defendants and to the public as described above will be immediate, and will be incapable of repair by legal remedy, regardless of the outcome of the appeal from said preliminary injunction and regardless of the outcome of the action on the merits, or of any counterclaim that defendants may interpose, below.

6. Pursuant to Rule 8(a) of the Federal Rules of Appellate Procedure, I submit the following items from the record below that are relevant to the disposition of this motion for stay or dissolution of the preliminary injunction issued by the District Court:

A copy of Defendants' Memorandum of Points and Authorities in Opposition To Plaintiffs' Motion for Preliminary Injunction, etc., filed below, attached hereto and marked "Exhibit B" of this Declaration.

Copies of Declarations Of Defendant DR. THOMAS WADDELL, and of Mary C. Dunlap, and Exhibits thereto, and of declarations of other volunteers involved in the Gay Games, which are lodged herewith (for lack of extra copies in this urgent time frame).

Copies of the moving papers filed by plaintiffs below, which are lodged herewith (for lack of extra copies in this urgent time frame).

Stay denied by District Court 8/23/82 2:00p.m. MCD

Dated: August 23rd, 1982

Mary C. Dunlap (Signed)
Declarant

File Date: August 24, 1982

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

INTERNATIONAL OLYMPIC COMMITTEE, a corporation organized and existing under the laws of Switzerland; UNITED STATES OLYMPIC COMMITTEE, a corporation organized and existing under the laws of the United States of America;

Plaintiffs,

vs.

SAN FRANCISCO ARTS & ATHLETCS, a California corportion; THOMAS F. WADDELL,

Defendants.

No. C-82-4183 RFP

Preliminary Injunction

This matter having come on for consideration of plaintiffs' request for preliminary injunction pursuant to the temporary restraining order and order to show cause issued by the Court on August 9, 1982; and the Court having conducted the show cause hearing on August 19, 1982, issued its order on August 20, 1982 granting plaintiffs' request for a preliminary injunction and made the findings of fact and conclusions of law set forth in the order, now therefore:

IT IS ORDERED that:

Defendants, their employees, agents, officers, attorneys and representatives, all persons participating with or acting in concert with them, and each of them shall immediately cease, desist and refrain from further use of "Olympic" or "Olympiad" or any confusingly similar word, term, name, trade name or any symbol, emblem, trademark or ensignia of the International Olympic Committee or the United States Olympic Committee, or any combinations or simulations thereof, for the purpose of trade, to induce the sale of any goods or services, or in connection with any advertising, promotion, publicity or production of any theatrical exhibition, athletic performance, competition or event pursuant to 36 U.S.C. § 380.

Plaintiffs shall file a bond in the amount of $1000 and serve a copy of the bond and this preliminary injunction upon defendants.

Dated: August 23, 1982

William W. Schwarzer (Signed)
United States District Judge

(Certificate of service omitted.)

File Date: August 23, 1982

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

INTERNATIONAL OLYMPIC COMMITTEE, etc., et al.,

Plaintiffs,

v.

SAN FRANCISCO ARTS AND ATHLETICS, INC., et. al.,

Defendants.

NO. C-82-4183-RFP

Order

Good cause appearing, defendants' ex parte motion for a stay of the preliminary injunction issued by this Court on August 20, 1982, is hereby denied.

IT IS SO ORDERED.

DATED: August 23, 1982

William W. Schwarzer (Signed)
United States District Judge

(Certificate of service omitted.)

File Date: August 27, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Answer to Complaint and Counterclaims of Defendants for Injunctive and for Injunctive and Declaratory Relief and Monetary Damages

(Copyright/Trademark/Unfair Competition/Rights to Free Speech and Association/Equal Protection of the Laws)

Defendants SAN FRANCISCO ARTS & ATHLETICS INC. and THOMAS F. WADDELL (below, "Defendants") hereby answer the Complaint filed in this action on August 9, 1982 and admit, deny and aver as follows:

1. Answering Paragraph 1, defendants admit that this is an action brought by plaintiffs pursuant to the statutes and laws recited in paragraph 1 of the Complaint. Except as expressly

so admitted, defendants deny each and every allegation of Paragraph 1 of the Complaint.

2. Answering Paragraph 2, defendants admit that plaintiffs purport to be nonprofit organizations and defendants admit the origin of plaintiff International Olympic Committee (below "IOC") and the principal places of business of plaintiffs recited in Paragraph 2, and defendants admit that plaintiff United States Olympic Committee (below, "USOC") does business in California and elsewhere. Except as expressly so admitted, defendants deny that plaintiffs USOC is a private corporation and defendants aver that for all purposes relevant in this action plaintiff USOC is acting and has acted as a public, governmental and/or quasigovernmental entity, and defendants further aver that plaintiff USOC is performing public and governmental functions in the United States and is receiving, being given, using and borrowing public resources of the people of the United States and of the State of California and of the City and County of Los Angeles. Except as expressly so admitted, defendants deny each and every one of the allegations of Paragraph 2 of the Complaint.

3. Defendants admit that SAN FRANCISCO ARTS & ATHLETICS INC. (below, "SFAA") is a corporation organized and existing under the laws of the State of California, and that the principal place of business of SFAA is the City and County of San Francisco. Defendants further aver that SFAA is a California non-profit corporation. Defendants admit that THOMAS F. WADDELL is a resident of San Francisco, California, and a founder and organizer of SFAA. Except as expressly so admitted, defendants deny each and every allegation of Paragraph 3 of the Complaint.

4. Defendants admit that the 1984 Olympic Games are scheduled to be held in Los Angeles, California. Except as expressly so admitted, defendants deny each and every allegation of Paragraph 4 of the Complaint, for lack of information and belief, and defendants further aver that the

allegations of Paragraph 4, lines 5-10, are argumentative and conclusory.

5. Defendants admit the substantial accuracy of Paragraph 5 of the Complaint.

6. Answering Paragraph 6, defendants admit the substantial accuracy of Paragrah 6 except insofar as said Paragrah alleges the carrying of a flaming Olympic torch across the United States, and as to said allegation, defendants specifically deny that said torch is "Olympic" in the sense of belonging to plaintiffs in any way.

7. Answering Paragraph 7, defendants admit that, except for a brief period in early 1982, and until August 9, 1982, defendants have described and promoted the athletic events sponsored by SFAA and scheduled to occur on August 28th through September 5th, 1982 as the "Gay Olympic Games", and have published a newsletter entitled "Gay Olympic Newsletter", and have printed or caused to be printed and have distributed brochures, flyers, tee shirts and other materials contining the phrase "Gay Olympic Games". Except as expressly so admitted, defendants deny each and every allegation of Paragraph 7 of the Complaint.

8. Answering Paragraph 8, defendants deny each and every allegation of Paragraph 8 of the Complaint.

9. Answering Paragraph 9, defendants admit that a letter dated December 23, 1981 signed by F. Don Miller, Executive Director of the USOC, was sent to "Gay Olympic Games" concerning use of the word "Olympic" and defendants admit that for a brief period in early 1982 defendants described the scheduled events of August 28-September 5, 1982 as the "Gay Athletic Games". Except as expressly so admitted, defendants deny each and every allegation of Paragraph 9 of the Complaint.

10. Defendats deny each and every allegation of Paragraphs 10, 11, 12 and 13 of the Complaint.

11. Defendants answer Paragraph 14 of the Complaint by incorporating their admissions, denials and averments as to Paragraphs 1 through 9 and 11 through 13 in their Answer in

response to Paragraph 14.

12. Answering Paragraph of the Complaint, defendants deny each and every allegation of Paragraph 15 for lack of information and belief, and defendants further aver that the allegations of Paragraph 15 are argumentative and conclusory.

13. Defendants deny each and every allegation of Paragraph 16 of the Complaint.

14. Defendants answer Paragraph 17 of the Complaint by incorporating their admissions, denials and averments as to Paragraphs 1 through 9 and 11 through 13 in their Answer in response to Paragraph 17.

15. Defendants deny each and every allegation of Paragraph 18, and defendants further aver that the allegations of Paragraph 18 are argumentative and conclusory.

16. Defendants deny each and every allegation of Paragraph 19, of the Complaint for lack of information and belief.

17. Defendants deny each and every allegation of Paragraph 20 of the Complaint.

18. Defendants answer Paragraph 21 of the Complaint by incorporating their admitssions, denials and averments as to Paragraphs 1 through 9, 11 through 13 and 18 through 19 in their Answer in response to Paragraph 21.

19. Defendants deny each and every allegation of Paragraph 20 [sic] at p.7 lines 24-32 and p.8 lines 1-4 for lack of information and belief, and defendants further aver that the allegations of Paragraph 20 [sic] are argumentative and conclusory.

20. Answering Paragraph 23, defendants admit that they have used the word "Olympic" only in connection with the Gay Olympic Games scheduled for August 28-September 5, 1982, as a descriptive term, and defendants aver that they sought permission from defendant USOC for said usage of the word "Olympic". Except as expressly so admitted, defendants deny each and every allegation of Paragraph 23 of the Complaint.

21. Defendants deny each and every allegation of Paragraph 24 of the Complaint.

22. Defendants answer Paragraph 25 of the Complaint by incorporating their admissions, denials and averments as to Paragraphs 1 through 9, 11 through 13, and 18 through 19 in their Answer in response to Paragraph 25.

23. Defendants admit the substantial accuracy of Paragraph 26 of the Complaint.

24. Defendants deny each and every allegation of Paragraph 27 of the Complaint.

25. Defendants deny each and every allegation of Paragraph 28 of the Complaint, and defendants further aver that the allegations of Pragraph 28 are argumentative and conclusory.

26. Defendants admit that defendants assert a legal right to use the word "Olympic" in description and promotion of the Gay Games scheduled for August 28-September 5, 1982. Except as expressly so admitted, defendants deny each and every allegation of Paragraph 29 of the Complaint.

27. Defendants answer Paragraph 30 of the Complaint by incorporating their admissions, denials and averments as to Paragraphs 1 through 9, 11 through 13, and 18 through 19 in their Answer in response to Paragraph 10.

28. Defendants deny each and every allegation of Paragraph 31 of the Complaint.

29. Defendants deny each and every allegation of Paragraph 32 of the Complaint.

30. Answering Paragraph 33, defendants admit that for a brief period in early 1982, defendants temporarily ceased use of the word "Olympic" and they used the term "Athletic" to describe the Gay Games, and defendants further aver that the temporary cessation of use of the term "Olympic" was intended by defendants as a temporary measure only, to enable defendants to gain legal advice and counsel as to defendants' right in relation to use of the term "Olympic"; defendants further aver that during the effective periods of the temporary restraining order and the preliminary injunc-

tion in this action, defendants have obeyed said orders in relation to use of the word "Olympic". Except as expressly so admitted, defendants deny each and every allegation of Paragraph 33 of the Complaint.

31. Answering Paragraph 34, defendants admit that defendants assert a right to use the word "Olympic" in description and promotion of the Gay Games scheduled for August 28-September 5, 1982. Except as expressly so admitted, defendants deny each and every allegation of Paragraph 34 of the Complaint.

32. Defendants answer Paragraph 35 of the Complaint by incorporating their admissions, denials and averments as to Paragraphs 1 through 9, 11 through 13, and 18 through 19 in their Answer in response to Paragraph 35..

33. Defendants deny each and every allegation of Paragraphs 36 and 37 of the Complaint.

WHEREFORE, defendants pray for judgment as hereinafter set forth.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs' Complaint fails to state any claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs' causes of action and prayer for relief are barred by the doctrine of laches.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs' causes of action and prayer for relief are barred by the doctrine of unclean hands.

FOURTH AFFIRMATIVE DEFENSE

Plaintiffs' causes of action and prayer for relief are barred by the First Amendment to the United States Constitution.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs' causes of action and prayer for relief are barred by the Fifth and Fourteenth Amendments to the United States Constitution.

SIXTH AFFIRMATIVE DEFENSE

The Court lacks jurisdiction of the subject matter of plaintiffs Sixth Claim For Relief insofar as plaintiffs rely therefor upon the doctrine of pendent jurisdiction, in that the said Sixth Claim for Relief is not an appropriate subject for the exercise of pendent jurisdiction by the Court.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs' causes of action and prayer for relief are barred by the doctrines of abandonment, waiver and estoppel, insofar as plaintiffs claim a right to sue the word "Olympic" exclusive of all other suers, in that plaintiffs have abandoned and waived protection of said term in its usages in commerce, and must therefore be estopped from seeking to enforce any claim(s) to the word "Olympic" as to defendnats' use of said term.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs' causes of action and prayer for relief are barred by the defense of fair use in description, as codified in 15 U.S.Code section 1115, in that said defense applies to protect defendants' use of the word "Olympic" of which plaintiffs complain.

NINTH AFFIRMATIVE DEFENSE

Plaintiffs' causes of action and prayer for relief are barred by the facts that "Olympic" has a generic meaning and is in the public domain.

TENTH AFFIRMATIVE DEFENSE

As between plaintiff International Olympic Commiittee (IOC) and defendants, there is no case or controversy presented in plaintiffs' Complaint, in that plaintiff IOC has accepted the generic nature of the word "Olympic" and no longer seeks to prevent the use of "Olympic".

WHEREFORE defendants pray for judgment as follows:

1. That plaintiffs take nothing by reason of their Complaint;

2. That judgment be entered in favor of defendants and against plaintiffs and the Complaint be dismissed with prejudice;

3. For costs incurred by defendants in this action, including but not limited to reasonable attorneys' fees to defendants in this action pursuant to 15 U.S. Code section 1116 and 42 U.S.Code section 1988;

4. For such other and further relief as the Court may deem proper.

Dated: August 27th, 1982

By: Mary C. Dunlap (Signed)
An Attorney for Defendants

COUNTERCLAIMS

Defendants and counterclaimants SFAA and DR. THOMAS F. WADDELL (below, "counterclaimants") hereby counterclaim against plaintiffs above-named as follows, and allege:

1. Counterclaimant SAN FRANCISCO ARTS & ATHLETICS INC. ("SFAA") is an entity organized and operating pursuant to the laws of the State of California as a non-profit corporation, for charitable, cultural and educational purposes.

2. Counterclaimant DR. WADDELL is a founder of SFAA and a creator of the Gay Games of 1982. DR. WADDELL's work in behalf of SFAA is and at all times herein relevant has been voluntary and unpaid.

3. The Gay Games of 1982 have been designed, promoted, staged and organized by SFAA, DR. WADDELL and others, and the word "Olympic" has been used in conjunction with said Gay Games of 1982, to advance the causes of equal treatment, freedom and dignity for all persons, regardless of sexual orientation.

4. Plaintiff United States Olympic Committee (USOC) has authorized uses of the word "Olympic" to persons for the purpose of trade, to induce the sale of goods and services,

and to promote theatrical exhibitions, athletic performances and athletic competitions.

5. Plaintiff USOC by its agents has intentionally discriminated against gay and lesbian individuals and against organizations of gay and lesbian persons, including counterclaimants, by means including but not limited to denying permission to such persons and groups to use the word "Olympic" in conjunction with amateur athletic performances and competitions while allowing use of the word "Olympic" to other individuals and organizations similarly situated, and by refusing and failing to support, assist, authorize and encourage amateur athletic opportunities for gay and lesbian persons, and upon information and belief, by threatening, menacing and harassing one or more proposed participants in the proposed Gay Games of 1982 who is/are amateur athletes and who may qualify to compete in the Olympic Games set for 1984 in Los Angeles, California.

6. Plaintiff USOC performs governmental functions, including but not limited to governing, regulating, sponsoring, authorizing and funding amateur athletic activities in the United States.

7. Plaintiff USOC receives and has received financial assistance and funding from the United States government, and, upon information and belief, from sub-federal governmental agencies in the United States.

8. Upon information and belief, plaintiffs USOC and IOC have used and they will continue to use publicly owned facilities and resources in and beyond the State of California in relation to the 1984 Olympic Games which are scheduled to be held in Los Angeles, California.

9. Upon information and belief, one of the attorneys representing USOC and IOC in this action, Mr. Vaughn Walker, stated to one or more reporters, in a statement that was aired or broadcast on Channel 4, KRON-TV, San Francsico, California, during the pendency of this action, that USOC and/or IOC is/are suing defendants SFAA and DR. WADDELL because, words to the effect of, "they are

not a suitable group".

10. Upon information and belief, plaintiff USOC and its Executive Director, F. Don Miller, have brough no litigation against the Police Olympics' sponsors, the Armenian Olympics' sponsors, the Senior Olympics' sponsors, and other simiarly situated sponsors, while USOC and IOC have brought an action against counterclaimants, because USOC by its agents including Executive Director Miller have a specific discriminatory motive and intent as to counterclaimants as they are representatives of gay/lesbian persons, to wit., animosity and ill-will directed against gay/lesbian persons.

11. Upon information and belief, plaintiff IOCC by its Committee Director Monique Berlioux and/or other agents of IOC at times relevant to the period of this litigation have taken the position that the word "Olympic" is generic, and IOC no longer seeks to control use of the word "Olympic", in spite of IOC's posture as a plaintiff in the action against counterclaimants.

12. Upon information and belief, athletic performances and competitions entitled, termed and/or described as "Olympic" or "Olympics" have occurred for at least two thousand eight hundred (2800) years, and the term "Olympic" and its derivatives are of antique, classical origin.

13. Upon information and belief, the word "Olympic" is used by millions of persons throughout the Wordl for a variety of commercial and non-commercial purposes, and said usage began more than two thousand (2,000) years prior to the bringing of suit by USOC and IOC against counterclaimants.

14. The litigation by plaintiffs USOC and IOC against counterclaimants, and specifically the temporary restraining order and preliminary injunction issued in said litigation, have caused financial damages to SFAA, in an amount as yet unascertained but which will be proved at trial of this action; said damages have resulted from the deprivation of use of the word 'Olympic" to counterclaimants.

15. Counterclaimants and the general public have been damaged and, absent injunctive relief upon this counterclaim, they will continue to be damaged, in a manner irreparable at law, by deprivation to them of the use of the word "Olympic" cause by plaintiffs' suit against SFAA and DR. WADDELL.

16. There exists an apparent controversy between palintiffs and counterclaimants as to their respective rights to use the word "Olympic". Said controversy can only be justly, equitably and legally resolved by the issuance of a declaratory judgment establishing the rights of SFAA and DR. WADDELL to use the word "Olympic" under law.

FIRST CAUSE OF ACTION

17. Counterclaimants reallege and incorporate in this First Cause of Action each of paragraphs 1-16 of these counterclaims, inclusive, above.

18. Plaintiffs IOC and USOC have acted in violation of the rights of SFAA, DR. WADDELL and the general public to speak and associate, as guaranteed by the First Amendment to the U.S. Constitution.

WHEREFORE, counterclaimants pray for judgment against plaintiffs as set forth below.

SECOND CAUSE OF ACITON

19. Counterclaimants reallege and incorporate in this Second Cause of Action each of paragraphs 1-16 of these counterclaims, inclusive, above.

20. Plaintiffs IOC and USOC have acted in violation of the rights of SFAA and DR. WADDELL and of gay and lesbian persons who are citizens of the United States to the equal protection of the laws, as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution.

WHEREFORE, counterclaimants pray for judgment against plaintiffs as follows:

1. That this Court grant preliminary and permanent injunctions, preventing USOC and IOC, their agents, and each of them, from taking any action to interfere with the use

of the word "Olympic" by counterclaimants, in conjunction with the nonprofit activities of SFAA, to promote and to sell items to pay the costs of, lawful activities of SFAA;

2. That this Court issue a declaratory judgment establishing the right of SFAA, DR. WADDELL and all others in association with them to use the word "Olympic" in conjunction with the non-profit activities of SFAA, to promote and to sell items to pay the costs of, lawful activities of SFAA, and including, if necessary, a declaration that 36 U.S. Code section 380 is unconstitutional as applied to counterclaimants in this action;

3. That this Court order plaintiffs IOC and USOC to pay damages to SFAA caused by plantiffs' suit agianst SFAA and DR. WADDELL in an amount in conformance with proof at trial of this action;

4. That this Court order plaintiffs USOC and IOC to pay the costs of SFAA and DR. WADDELL that have been incurred by counterclaimiants in the prosecution of these Counterclaims, including but not limited to reasonable attorneys' fees incurred by counterclaimants in conformance with 42 U.S. Code section 1988.

5. For such other and further relief as the Court may deem proper.

Dated: August 27, 1982

By: Mary C. Dunlap (Signed)
An Attorney for Counterclaimants/Defendants

Supreme Court, U.S.
FILED
DEC 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-270

In the Supreme Court of the United States

OCTOBER TERM, 1986

SAN FRANCISCO ARTS & ATHLETICS, INC.
and THOMAS F. WADDELL, M.D.
Petitioners,

vs.

UNITED STATES OLYMPIC COMMITTEE
and INTERNATIONAL OLYMPIC COMMITTEE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX II

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PETITION FOR CERTIORARI FILED AUGUST 19, 1986
CERTIORARI GRANTED OCTOBER 20, 1986

File Date: September 20, 1982

(Names & caption omitted in printing, see J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

(Title omitted.)

Plaintiffs' Answer to Counterclaims

Plaintiffs *INTERNATIONAL OLYMPIC COMMITTEE* and *UNITED STATES OLYMPIC COMMITTEE*, and each of them, hereby answer the purported counterclaims filed herein on August 27, 1982 at pages 9 through 14 of defendants' answer and admit, deny and aver as follows:

1. Plaintiffs admit the allegations of paragraphs 1 and 4.

2. Plaintiffs admit the allegations of the first sentence of paragraph 2; except as so admitted, plaintiffs lack information or belief sufficient to enable them to respond to the remaining allegations of paragraph 2 and on that ground deny said allegations.

3. Answering paragraph 3, plaintiffs admit that SFAA, Waddell and others designed, promoted, staged and organized the Gay Games of 1982 and used "Olympic" in connection with those games; except as so admitted, plaintiffs lack information or belief sufficient to enable them to respond to the remaining allegations of paragraph 3 and on that ground deny said allegations.

4. Plaintiffs deny the allegations of paragraphs 5, 6, 10, 11, 14, 15, 18 and 20.

5. Answering paragraph 7, plaintiffs admit that USOC has received financial assistance from the United States Government; except as so admitted, plaintiffs deny the remaining allegations of paragraph 7.

6. Answering paragraph 8, plaintiffs admit that there are plans for certain publicly owned facilities in the State of

California to be used in connection with the 1984 Olympic Games; except as so admitted, plaintiffs deny the remaining allegations of paragraph 8.

7. Answering paragraph 9, plaintiffs admit that one of their counsel stated to a television news reporter that defendant SFAA was not a group suitable for use of Olympic terminology and symbols because SFAA's program did not comply with the requirements and needs of plaintiffs; except as so admitted, plaintiffs deny the remaining allegations of paragraph 9.

8. Answering paragraphs 12 and 13, plaintiffs admit that "Olympic" is of ancient origin and has been widely used in many places for a variety of purposes including athletic performances and competitions; except as so admitted, plaintiffs deny the remaining allegations of paragraphs 12 and 13.

9. Plaintiffs admit the allegations of the first sentence of paragraph 16; except as so admitted, plaintiffs deny the remainng allegations of paragraph 16.

10 Answering paragraphs 17 and 19, plaintiffs reallege and incorporate herein their responses to paragraphs 1 through 16, inclusive.

11. Plaintiffs deny that defendants have been injured in any amount or at all as a result of any act or wrongdoing of plaintiffs.

12. Plaintiffs deny each and every allegation of the counterclaims not expressly admitted herein.

FIRST AFFIRMATIVE DEFENSE

The counterclaims fail to state a claim upon which relief can be granted against plaintiffs, or either of them.

SECOND AFFIRMATIVE DEFENSE

The counterclaims and the relief prayed for therein are barred in that the award of such relief would be contrary to the Amateur Sports Act of 1978 (36 U.S.C. § 371, et seq.).

THIRD AFFIRMATIVE DEFENSE

The counterclaims and the relief prayed for therein are barred by the unclean hands of defendants in that defendants agreed to refrain from use of Olympic terminology and symbols in connection with the Gay Games of 1982 but thereafter violated that agreement.

FOURTH AFFIRMATIVE DEFENSE

Defendants lack standing to challenge the constitutionality of 36 U.S.C. § 380 or any other provision of the Amateur Sports Act of 1978 (36 U.S.C. § 371, et seq.)

FIFTH AFFIRMATIVE DEFENSE

The counterclaims and the relief prayed for therein are barred by laches in that defendants failed promply to raise the claims purportedly stated in the counterclaims and plaintiffs relied to their detriment upon defendants' failure to assert such claims.

W h e r e f o r e, plaintiffs pray for judgment on defendants' counterclaims as follows:

1. Defendants take nothing by reason of their purported counterclaims;

2. Judgment be entered in favor of plaintiffs, and against defendants on the purported counterclaims and said counterclaims be dismissed with prejudice.

3. For costs incurred by plaintiffs in this action including plaintiffs' reasonable attorneys' fees; and

4. Such other and further relief that the court may deem fair and proper.

Dated: September 20, 1982

Vaughn R. Walker (Signed)
Attorneys for Plaintiffs
International Olympic Committee and
United States Olympic Committee

(Names omitted, See J.A. 5, above.)

File Date: February 9, 1983

(Names & caption omitted in printing, see J.A. 5, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Answers to Defendants' First Set of Interrogatories

Plaintiffs hereby respond to Defendants' First Set of Interrogatories ("Interrogatories") dated November 4, 1982 as follows:

GENERAL OBJECTION

Plaintiffs object to defendants' Interrogatories insofar as they request disclosure of information or documents consisting of the work product of plaintiffs' attorneys or communications subject to the attorney-client privilege.

GENERAL RESERVATIONS OF RIGHTS

All answers are accurate to the best of plaintiffs' present knowldge and belief but in the event further proceedings or investigation should indicate any respect in which any answer needs to be supplemented or modified, plaintiffs reserve the right to serve and file supplemental answers for such purpose.

Any statement made in response to Defendants' Interrogatories shall be without prejudice to plaintiffs' right to object to the admission in evidence or relevance of such information or documentation or its right to object to further discovery of information or documentation relating to the same subject matter upon any valid ground or grounds including without limitation privilege, work product, lack of relevance, lack of materiality, overbreadth, burdensomeness, oppressiveness or incompetence.

Interrogatory 1. Please state each of the ways, if any, in which USOC has acted to promote amateur athletic oppor-

tunities and activities for each of the below-designated groups:

a. racial and ethnic minorities;
b. females;
c. persons under the age of 18 years;
d. persons over the age of 35 years;
e. economically disadvantaged (e.g. low-income persons);
f. gay males and lesbians.

Answer The United States Olympic Committee is prohibited by its charter from discriminating against or in favor of any racial, ethnic, religious or other groups of individuals. However, pursuant to its charter mandate to promote the development of amateur sports, with attention to groups needing special assistance, the Committee has, for example, authorized use of "Special Olympics" for handicapped individuals.

(a) The Olympic Committee has not discriminated against but welcomes individuals from all racial and ethnic groups to compete for a place on the Olympic team.

(b) The United States Olympic Committee has, for example, supported an increase in the number of events for women in the Olympic Games and other international sports competitions, including previously all-male events such as marathon, cycling and shooting. Moreover, the Olympic Committee has seen that women are represented on all committees of the United States Olympic Committee.

(c) If capable of qualifying, athletes of all ages are eligible to compete for a place on the Olympic team. However, the Olympic Committee, in response to its objectives of promoting amateur sports and developing amateur athletes, has also authorized both the "Junior Olympics" and the "Explorer Olympics" to encourage all youth of the United States to participate in "grass roots" sports programs.

Moreover, almost all national governing bodies have

conducted "grass roots" programs in their respective sports, at the United States Olympic Committee's Training Center. These programs are aimed at developing new athletes in those sports, and by their very nature tend to be youth oriented. In addition, the Olympic Committee has allocated development funds to the national governing bodies to expand the basic participation of youth in amateur athletics.

(d) As with young athletes, older athletes are freely able to compete for a place on the Olympic team.

(e) The Olympic Committee makes available to all athletes selected by national governing bodies, its specific training facilities as well as other means of subsidizing the training of qualified athletes. These include at least three specific programs which provide some form of financial support to enable the athletes to train properly:

(i) The Elite Athlete Program". Each national governing body may identify specific athletes that they recognize as being world class potential. Those athletes then are entitled to additional financial support for training.

(ii) "Operation Gold". The Olympic Committee, with the help of the national governing body in each sport, identifies the leading contenders in each sport based on actual world class standing. Those athletes would also be entitled to additional financial support for training.

These two programs have assisted approximately one thousand amateur athletes.

(iii) The "Job Opportunities Program". Leading amateur athletes are given assistance in finding jobs which will accommodate their training schedules, and employers who will be liberal in paid leave policies to permit time away for competition and training.

(f) As stated in the response to Interrogatory 1 (a), the Olympic Committee is prohibited by its charter from

discriminating, and welcomes all qualified individuals to try out for the Olympic teams.

Interrogatory 2. Please describe the contents of all rules, policies, guidelines and decisions of IOC and USOC concerning sexual activity by amateur athletes competing for places in the Olympic Games, at any stage of such competitions.

Answer The plaintiffs have no rules, policies, guidelines or decisions concerning sexual orientation by amateur athletes.

Interrogatory 3. Please state your opinion as to whether every use of the terms "Olympic", "Olympics", "Olympiad" or any of these terms by any person for the purpose of trade, without the consent of USOC, deceives, tends to confuse or tends to cause mistake by the public as to the relationship of the user or the user's activity with the Olympic Games or the USOC? Please identify all uses for the purpose of trade that, in your opinion, are not in and of themselves deceptive, tending to cause confusion or mistake, referring specifically to each and every such use as to which you had information or belief as of August 9, 1982. Please also specify all facts and inferences upon which you base your opinion in response to this Interrogatory.

Answer It is the contention of the plaintiffs that every use of the terms "Olympic", "Olympics" or "Olympiad" for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition may tend to cause confusion, to causes mistake, to deceive, or to falsely suggest a connection with the International Olympic Committee, the U.S. Olympic Committee or any Olympic activity.

As to what uses may not be deceptive, the plaintiffs are unable to answer speculative or hypothetical questions.

Interrogatory 4. Please state your opinion as to whether every use of the terms "Olympic", "Olympics", "Olympiad" or any of these terms by any person to induce the sale of goods, services or goods and services, without the consent of USOC, deceives, tends to confuse, or tends to cause mistake

by the public as to the relationship of the user or the user's activity with the Olympic Games or the USOC. Please identify all uses for the purpose of inducing sale of goods/services that, in your opinion, are not in and of themselves deceptive, tending to cause confusion or mistake, referring specifically to each and every such use as to which you had information or belief as of August 9, 1982.

Answer See response to Interrogatory No. 3

Interrogatory 5. Please state your opinion as to whether every use of the terms "Olympic", "Olympics", "Olympiad" or any of these terms by any person to promote a theatrical exhibition, athletic performance, or competition, without the consent of the USOC, deceives, tends to confuse or tends to cause mistake by the public as to the relationship of the user or the user's activity with the Olympic Games or the USOC. Please identify all uses for the purposes of promoting a theatrical exhibition, athletic performance, or competition that, in your opinion, are not in and of themselves deceptive, tending to cause confusion or mistake, referring specifically to each and every such use as to which you had information or belief as of August 9, 1982.

Answer See response to Interrogatory No. 3.

Interrogatory 6. Please provide the name and business address of every corporation, organization and every public entity or agency that has contributed, donated or pledged to contribute or donate five hundred dollars ($500.00) or more in money, goods, services or any combination thereof, to plaintiffs or either of them, to assist in supporting, or to pay expenses and costs related to, the 1984 Olympic Games to be held in Los Angeles, California.

Answer Plaintiffs object to Interrogatory No. 6 in that it is over broad and burdensome, in that it is irrelevant and not calculated to lead to discovery of relevant evidence, and further, in that it requests discovery of sensitive, confidential information, the public disclosure of which may tend to injure Plaintiffs in their efforts to solicit contributions from persons, many of whom wish to remain anonymous.

Interrogatory 7. Please provide the name, business address, and an identification of his/her relationship to USOC or IOC or both, as of August 9, 1982, as to each person who voted for and/or consented to the civil action filed by plaintiffs against defendants on August 9, 1982, bearing number C-82-4183 RFP.

Answer The directory of the Administrative Committee of the United States Olympic Committee will be disclosed at the time of document production. The International Olympic Committee responds: S.E.M. Juan Antonio Samaranch, President, International Olympic Committee.

Interrogatory 8. Please state whether IOC holds any ownership interest or other proprietary interest in the U.S. trademarks or service marks, or any of them, that USOC purports to hold as to the words "Olympic", "Olympics", "Olympiad" or any of these words. If the position of the IOC is different in any respect from the position of USOC in response to this Interrogatory, please state the response of each plaintiff separately, identifying each response by its sponsor.

Answer The charter of the International Olympic Committee together with its rules and bylaws, and the charter of the United States Olympic Committee together with its rules and bylaws, and a copy of Section 380 of Title 36, United States Code will be made available at the time of document production.

Interrogatory 9. If the answer of IOC, USOC or either of them to Interrogatory 8, above, is affirmative, please describe the nature and origin of IOC's ownership interest or other proprietary interest in any of said trademarks or service marks, or both.

Answer See response to Interrogatory No. 8.

Interrogatory 10. Please indicate whether any person seeking entry into the Untied States for purposes of participation in athletic events of the Olympic Games has at any time been denied a visa for U.S. visiting or been excluded from entering the United States because of his/her sexual

orientation.

Answer The plaintiffs have no knowledge of the exclusion of any person from the United States based upon sexual orientation.

Interrogatory 11. If the answer to Interrogatory 10, above, is affirmative, please indicate the number of persons so denied visas or excluded from U.S. entry, indicating as to each person or number the year of exclusion or denial of visa.

Answer Not applicable.

Interrogatory 12. Do you contend that gay males and lesbians who seek or who have sought to compete for participation in, and to compete in, the athletic events of the Olympic Games have been accorded equal treatment relative to all heterosexual competitors at all times that USOC and IOC have managed and governed the Olympic Games? Please set forth all facts, opinions and inferences upon which you base your answer to this Interrogatory.

Answer The plaintiffs contend that gay males and lesbians who have sought to compete for participation in the athletic events of the Olympic Games have been awarded equal treatment by plaintiffs relative to all heterosexual competitors. The charters of the United States Olympic Committee and of the International Olympic Committee do not recognize discrimination based on sexual orientation.

Interrogatory 13. Do you contend that the uses and intended uses of the terms "Olympic", "Olympics", "Olympiad" or any of these terms, by defendants, as alleged in your Complaint filed in this civil action on August 9, 1982, posed a greater risk of deception, or of tendency to cause confusion or to cause mistake as to the relationship of the user(s) and the activities of the user(s), or either of them, to the USOC or the Olympic Games, than the uses of the terms "Olympic", "Olympics", "Olympiad" or any of these terms by (a) police; (b) firefighters; (c) Armenians; (d) senior citizens; (e) other groups as to whom or which you had information or belief as to uses of any of those terms when you commenced this civil

action? If your answer to any subpart(s) of this Interrogatory is affirmative, please provide every fact, opinion and inference upon which you base that answer, as to each comparison group as to which your answer is affirmative. Please answer each subpart of this Interrogatory separately.

Answer The plaintiffs object to Interrogatory No. 13 in that is is irrelevant because: (a) the test for violation of 36 USC § 380 is not comparative but absolute, the test being based upon usages prohibited by the statute without reference to other infringing or non-infringing uses; (b) the interrogatory presumes other uses without basis or even an allegation of the parameters of such use; and, (c) the defendant has not shown or even alleged privity with the hypothetical groups listed in Interrogatory 13, even presupposing such uses.

It is the contention of the United States Olympic Committee that, regardless of whether there are other authorized or unauthorized uses, the defendants' use, particularly in the fashion in which used and promoted, conflicts with the United States Olympic Committee's primary area of responsibility and, therefore, clearly falls within the prohibitions of the statute.

Interrogatory 14. Do you contend in this civil action that the uses of the terms "Olympic", "Olympics", "Olympiad" or any of these terms by defendants, or either of them, prior to issuance of the temporary restraining order in this civil action, caused or threatened to cause any special or distinct harm to you, or to either USOC or IOC, because of the affiliation of defendants with gay males and lesbians, or because of the affiliation of defendants with the cause of overcoming discrimination against lesbians and gay males, or both?

Answer The plaintiffs do not so contend.

Interrogatory 15. If your answer to Interrogatory 14 is affirmative, please specify each form and nature of special or distinct harm to you, or to USOC or IOC, that you contend was caused or was threatened to be caused by the affiliation

of defendants with gay males and lesbians, or by the affiliation of defendants with the cause of overcoming discrimination against lesbians and gay males, or both.

Answer Not applicable.

Interrogatory 16. Please state every fact, opinion and inference upon which you base the claim, contained in paragraph 24 of your Complaint filed in this civil action on August 9, 1982, that as of August 9, 1982 "USOC has suffered and will continue to suffer immediate and irreparable injury" unless defendants were enjoined from use of the words "Olympic", "Olympics", "Olympiad" and any of these words.

Answer Through use of "Olympics", Defendants have tended to suggest a connection or association with the International Olympic Committee, the United States Olympic Committee or an Olympic activity, placing that term outside the ability of the plaintiffs to control the goodwill associated therewith. See opinion of Chief Judge Robert Peckham herein, at 12-13.

Interrogatory 17. In your opinion, do gay males and lesbians suffer discrimination as gay males and lesbians in the United States in the matter of amateur athletic opportunities? Please explain the basis of your opinion.

Answer The plaintiffs have no opinion.

Interrogatory 18. Do you claim that IOC has suffered any injury because of the uses or intended uses of the terms "Olympic", "Olympics", "Olympiad" or any of these terms, as said uses and intended uses were alleged in your Complaint filed in this civil action?

Answer The plaintiffs do so contend. There is only one authentic Olympic Games, which is open to all athletes from countries with National Olympic Committees.

Interrogatory 19. If your answer to Interrogatory 18, above, is affirmative, please specify and fully describe each injury that IOC has suffered because of the uses and intended uses of the terms "Olympic", "Olympics", "Olympiad" or any of these terms by defendants, as said uses and intended uses

were alleged in your Complaint filed in this civil action.

Answer See response to Interrogatory No. 16.

Interrogatory 20. Do you contend in this civil action that defendants' uses and intended uses of the terms "Olympic", "Olympics", "Olympiad" or any of these terms, as said uses and intended uses are alleged in your Complaint filed in this civil action on August 9, 1982, would infringe or violate your purported rights to said terms, or to any of them, if defendants had not charged any admission fees to participants nor to observers of the Gay Games of 1982, and if defendants had not sold any items containing the said terms, or any of them?

Answer The plaintiffs object to Interrogatory No. 20 in that it calls for speculation upon presumed facts which are contrary to the facts of record in this case.

Interrogatory 21. Do you contend that your rights to the use of the terms "Olympic", "Olympics", "Olympiad" and each of these terms include a right to preliminary injunctive relief to prevent any person(s) from using the said terms, or any of them, in any way or for any purpose, whatsoever?

Answer The plaintiffs do not contend that they are entitled to preliminary injunctive relief to prevent "any person" from using Olympic, Olympic, or Olympiad "in any way or for any purpose whatsoever...."

Interrogatory 22. If your answer to Interrogatory 21, above, is negative, please describe the uses of the terms "Olympic", "Olympics", "Olympiad" or any of these terms that, in your opinion, do not violate your rights to the use of said terms and that do not entitle you to preliminary injunctive relief to prevent such use(s).

Answer See 36 USC § 380, which contains exceptions to the generally broad prohibition against use of "Olympic", "Olympics" or "Olympiad". One example may be the factual report of an actual event: that is, a news report regarding the Olympic games.

Interrogatory 23. Please specify, by the nature and amount of financial assistance received, the purported purpose(s) of

said assistance, the date said assistance was received and the name of each governmental authority that authorized such assistance (i.e. the name of the entity or branch or agency), each and every item of financial assitance that USOC has received at any time(s) from the United States government, the government of the State of California, the government of the City, County and/or City and County of Los Angeles, and/or any other governmental entity or subdivision within the United States.

Answer (a) The United States Olympic Committee has only twice received monies from the United States Government:

1. By amendment to the Amateur Sports Act, Congress authorized payment of ten million dollars to the United States Olympic Committee as compensation for the interference of the United States Government in the affairs of the United States Olympic Committee in prevailing upon the Committee to refrain from sending a representative team to the 1980 Olympics in Moscow.

2. The United States Olympic Committee recently has received 6.3 million dollars from the sale to the public of coins minted by the United States bearing Olympic designations. Those monies stem from a surcharge on the price of those coins, in the nature of a non tax-deductable donation to the Olympic Committee.

(b) The United States Olympic Committee has received some of the same benefits enjoyed by other private corporations in locating facilities in a particular site. This consisted primarily of an inducement by the City of Colorado Springs, Colorado to have the United States Olympic Committee locate its new Olympic Training Center in Colorado Springs. That inducement took the form of a reduced lease on a portion of the land on which the Training Center is located.

It is the contention of the United States Olympic Committee that none of these monies or inducements constituted or were "financial assistance" from a Governmental authority in the nature of a grant, gift, appropriation or subsidization.

Interrogatory 24. Please identify, by address of the facility, name(s) of the entity or entities or agency or agencies who own the facility, and purpose(s) for which the facility has been or is to be used by USOC, each publicly owned facility that USOC has used or has plans to use in conjunction with the Olympic Games at any time(s).

Answer To the extent that the USOC has at any time used public facilities, it has done so at the direction of an Organizing Committee of the Games, which facilities remained at all times under the control of such Organizing Committee.

Interrogatory 25. Please indicate, as to each facility identified in response to Interrogatory 24, whether the use of said facility by USOC has been or will be donated without any monetary charge to USOC for the use of the facility, and the amount of any charge that has been or is to be paid by USOC for use of each such facility.

Answer The USOC has no knowledge of any arrangements.

Interrogatory 26. Please state whether the USOC has the same rights and duties under the U. S. Internal Revenue Code as any other private, non-profit corporation.

Answer The United States Olympic Committee does contend that it operates under the same rights and duties as any other private, non-profit corporation with respect to the United States Internal Revenue Code.

Interrogatory 27. Please state whether the USOC has at any time paid any income taxes to the United Sates, or to the Internal Revenue Service, and please indicate the year of any such payment and the amount of income taxes paid by USOC.

Answer The United States Olympic Committee has not paid income taxes to any such governmental authority.

Interrogatory 28. Please provide the names and business addresses of all persons who are directors, officers or executives of USOC or IOC, or both, as of August 9, 1982.

Answer The directories of the International Olympic

Committee and of the United States Olympic Committee will be made available at the time of document production.

Interrogatory 29. Please state the total amount of assets and revenue including accounts receivable that were possessed by USOC as of each of the following dates: (a) January 1, 1978; (b) January 1, 1980; (c) January 1, 1982; (d) August 9, 1982.

Answer The United States Olympic Committee objects to Interrogatory 29 as irrelevant and not tending to lead to the discovery of relevant evidence; and further, in that public disclosure of such information may tend to injure Plaintiff in its fundraising activities.

Interrogatory 30. Please state the total amount of liabilities including accounts payable that were possessed/owed by USOC as of each of the dates set forth in Interrogatory 29, above.

Answer See response to Interrogatory No. 29.

Interrogatory 31. Please state the total amount of attorneys fees paid by USOC and IOC, or either of them, to any attorney(s) in conjunction with the representation of USOC and IOC, or either of them, in this civil action, as of the date of service of these Interrogatories upon you, specifying the services for which such fees have been paid and the amount per hour that was charged to you.

Answer The plaintiffs object to Interrogatory No. 31 in that it is premature, relating as it does only to the amount of the final judgment to be entered in the action. The plaintiffs will provide such information pursuant to a protective order at such time as it may become relevant.

(Jurats and certificates of service omitted.)

File Date: February 9, 1983

(Names & caption omitted in printing, see J.A. 5, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Response to Defendants' Request to Produce Documents

Plaintiffs hereby respond to Defendants' First Set of Requests for Production of Documents to Plaintiffs United States Olympic Committee and International Olympic Committee ("Document Requests") dated November 4, 1982.

GENERAL OBJECTIONS

1. Plaintiffs object to defendants' Document Requests insofar as they request production or disclosure of information or documents consisting of the work product of plaintiffs' attorneys or communications subject to the attorney-client privilege.

2. Plaintiffs object to defendants' Document Request insofar as it requests the production of documents, contrary to Rule 34(b) of the Federal Rules of Civil Procedure in an unreasonable time, place and manner (to wit producing and delivering to defendants' counsel a copy of all documents responsive to said request).

GENERAL RESERVATIONS OF RIGHTS

1. All responses are accurate to the best of plaintiffs' present knowledge and belief but in the event further proceedings or investigation should indicate any respect in which any response needs to be supplemented or modified, plaintiffs reserve the right to serve and file supplemental answers for such purpose.

2. Any statement made in response to defendants' Docu-

ment Request shall be without prejudice to plaintiffs' right to object to the admission in evidence or relevance of such information or documentation or the right to object to further discovery of information or documentation relating to the same subject matter upon any valid ground or grounds, including without limitation privileged work product, lack of relevance, lack of materiality, overbreadth, burdensomeness, oppressiveness or incompetence.

Request No. 1. All documents that contain any reference to any disapproval, of whatever form or character, by IOC, USOC or both IOC and USOC, of any use(s) of the term "Olympic", "Olympics", "Olympiad", or any of those terms, by any person(s), group(s), entity or entities, or organization(s).

Response. See lists of:

(a) correspondence by United States Olympic Committee requesting persons to cease and desist from using relevant Olympic terminology;

(b) *inter partes* administrative proceedings before the United States Patent and Trademark Office regarding applications to register Olympic related marks; and

(c) litigation before various United States District Courts involving Olympic related marks.

(d) files of the International Olympic Committee listing uses of "Olympic" in the United States. Files regarding unauthorized uses outside the United States are not listed as irrelevant.

At a mutually agreeable time and date, actual documents from the files of the United States Olympic Committee will be made available for inspection by defendants at the United States Olympic Committee's offices in Colorado Springs, Colorado, due to the voluminous nature of the files.

The International Olympic Committee maintains its files in Laussanne, Switzerland, and production would be burdensome, and plaintiff therefore objects. However, a portion of particular files may be made available at the offices of plaintiffs' attorney, Vaughn R. Walker, in response

to a limited request.

Plaintiff United States Olympic Committee also has documents which evidence disapproval of other unauthorized uses of Olympic related designations such as "Olympian", as well as disapproval of specific uses of Olympic designations by otherwise authorized persons. These have not been produced as not responsive.

Request No. 2. All documents that contain any reference to any use(s) of the terms "Olympic", "Olympics", "Olympiad" or any of those terms, in conjunction with the promotion of any theatrical exhibition, athletic performance, or competition, where such use(s) was/were by any person(s), group(s), entity or entities, or organizations(s) other than you.

Response. Plaintiffs object to Request No. 2 on the grounds that it is overly broad and burdensome. It is not confined to unauthorized uses, as was Request No. 1, and authorized uses are irrelevant to this action.

Request No. 3. All documents containing any reference to defendants, or either of them.

Response. Plaintiffs will produce responsive documents at a mutually convenient time and date at the offices of their attorney Vaughn R. Walker. Plaintiffs have also produced to defendants during proceedings herein on plaintiffs' motions for a temporary restraining order and for a preliminary injunction, numerous other documents in the nature of communications between the parties, publications regarding defendants or their athletic competition, and defendants' own documents.

Privilege is claimed for attorney-client communications and for documents which reflect attorney work product. Plaintiffs will endeavor to assemble a schedule of these documents should it become necessary.

Request No. 4. All documents that contain any reference to any information concerning the Gay Games that were staged in San Francisco, California in 1982, and which are referred to by plaintiffs in their complaint filed in this civil

action, at paragraph 6 thereof, on August 9, 1982.

Response. See response to Request No. 3.

Request No. 5. All documents that consist of communications and correspondence, or either, that was/were sent to you by any actual or prospective participant in the Gay Games of 1982, which Gay Games are defined in Request No. 4., above, and which communications and correspondence, or either, contain any reference to the said Gay Games.

Response. The plaintiffs object to this Interrogatory insofar as "prospective participant" may include every individual in the world. The plaintiffs do answer, however, that no documents exist responsive to a request confined to persons known or thought to be potential participants.

Request No. 6. All documents that contain any reference to any athletic competition(s) or performance(s) that have by identified in writing or print by anyone as being "Olympic", "Olympics", an "Olympiad" or any of these terms, and that have been sponsored, organized by, identified with or held for participation by any of the following groups: (a.) a group identified by occupation (e.g. police, firefighters)' (b.) a group identified by ethnicity (e.g. Armenians, Chinese)' (c.) a group identified by age (e.g. persons under 18 years of age, persons over 35 years of age); (d.) a group identified by physical condition (e.g. handicapped or disabled persons, kidney transplant recipients).

Response.(a) See response to Request No. 1.

(b) See response to Request No. 1.

(c) See response to Request No. 1. The United States Olympic Committee objects to this Request both as irrelevant and overly broad and burdensome insofar as it calls for all documents regarding authorized programs, such as "Junior Olympics".

(d) See response to Request No. 1. The United States Olympic Committee objects to this Request as irrelevant and as overly broad and burdensome insofar as it calls for all documents regarding authorized programs such as the

"Special Olympics".

Request No. 7. All documents that contain any reference to the receipt of financial assistance by you from the United States government, as referred to in your "Answer to Counterclaims" filed in this civil action, at paragraph 5 thereof.

Response. (a) The United States Olympic Committee will make available at the offices of its attorney, Vaughn R. Walker, documents regarding compensation by the United States government for injury to the United States Olympic Committee resulting from the boycott of the 1980 Olympic Games.

(b) The United States Olympic Committee will make available at the offices of its attorney, Vaughn R. Walker, documents regarding receipt of monies from the sale of official Olympic coins bearing Olympic designations. The Olympic Committee has as well, voluminous files regarding its efforts in support of Congressional legislation authorizing the minting of coins bearing Olympic designations, which have not been produced as not responsive.

Request No. 8. All documents filed or presented by you to any agency or branch of the United States Government pursuant to Title 36 of the United States Code at section 384 thereof.

Response. No such documents exist.

Request No. 9. All document that contain any reference to the plans for certain publicly owned facililities in the State of California to be used in connection with the 1984 Olympic Games, as referred to by you in your "Answer to Counterclaims" filed in this civil action, at paragraph 6 thereof.

Response. The plaintiffs have no such documents in their possession.

Request No. 10. All documents upon which you base the following statement: " 'Olympic' ...has been used widely in many places for a variety of purposes including athletic performances and competitions" which statement is contained in your "Answer to Counterclaims" files in this civil

action, at pargraph 8 thereof.

Response. The plaintiffs object to this Request as overly broad and burdensome, in that it calls for thousands of documents from hundreds of files, without regard to the nature of the use, location of use, or whether authorized or unauthorized. Plaintiffs have already provided a list of known, unauthorized uses in their responses to Request No. 1.

Request No. 11. All documents that contain any reference to any information about the subject of sexual orientation, or to any information concerning the sexual orientation of any person(s), insofar as said document(s) also contain(s) any reference to the participation of one or more persons in any athletic activities.

Response. Plaintiffs will make available at a mutually convenient time and date, at the offices of their attorney Vaugh R. Walker, such responsive documents as may exist.

Request No. 12. All documents that contain any reference to any policy or policies, practice(s), decision(s), rule(s), or guideline(s) of IOC or USOC, or both of them, concerning the subject of sexual orientation, or concerning one or more gay men or one or more lesbians, or both.

Response. No such documents exist.

Request No. 13. All documents that contain any reference to any attitude(s), belief(s), thought(s), practice(s), decision(s), guideline(s) or viewpoint(s) of any officer, manager or executive of USOC or of IOC, including but not limited to F. Don Miller, concerning the subject of sexual orientation or concerning the subject of one or more gay men, or one or more lesbians, or both.

Response. The plaintiffs object to this Request in that the personal beliefs of their members or employees are irrelevant to this action. Nevertheless, all possibly responsive documents have been produced to defendants previously, or will be produced in response to Request No. 11.

Request No. 14. All documents upon which plaintiffs in any part rely or base their claim that the public will be

confused, or tend to be confused, or will be deceived, or will be caused to make a mistake, as to the relationship of defendants and/or the Gay Games of 1982, as defined above in Request 4, above, vis à vis you or USOC or the Olympic Games, by use(s) of the terms "Olympic", "Olympics", "Olympiad" or any of these terms by defendants, or either of them, which claim is made by you in paragraph 34 of the "Complaint" filed in this civil action of August 9, 1982.

Response. See response to Request No. 3. Additional documents will be produced at the offices of plaintiffs' attorney, Vaughn R. Walker, at a mutually convenient time and date.

Request No. 15. All documents upon which plaintiffs in any part rely or base their claim that the value of plaintiffs' name will be impaired, by the use(s) of the terms "Olympic", "Olympics", "Olympiad" or any of these terms by defendants, or either of them, which claim is made by you in paragraph 34 of the "Complaint" filed in this civil action on August 9, 1982.

Response. See response to Request No. 14.

Request No. 16. All documents upon which plaintiffs in any part rely or base their claim that plaintiffs' business reputation and goodwill will be injured by the use of the terms "Olympic", "Olympics", "Olympiad" or any of these terms, by defendants, or either of them, which claim is made by you in paragraph 34 of the "Complaint" filed in this civil action on August 9, 1982.

Response. See response to Request No. 14.

Request No. 17. All documents filed by you in any civil suits brought by USOC, or IOC, or both of them, concerning the rights of plaintiffs, or either of them, to use and to prevent or restrain any others(s) from using the terms "Olympic", "Olympics", "Olympiad" or any of these terms, excluding documents filed in this civil action.

Response. Plaintiffs object to Request No. 17 on grounds that it seeks documents which are in the public record and which are as accessible to defendants as they are to plaintiffs,

and that the request seeks information not relevant nor calculated to lead to the discovery of relevant evidence insofar as it requests documents regarding different Olympic designations, used in different fashions by unrelated third parties.

Request No. 18. All documents containing any information about the method(s) by which USOC proposes or intends to raise funds for the 1984 Olympic Games to be held in Los Angeles, California.

Response. The United States Olympic Committee does not raise funds for the conduct of the Olympic Games themselves.

Request No. 19. All documents that contain any reference to any claim of an ownership interest or other proprietary interest by plaintiff IOC in the US trademarks and/or service marks held by plaintiff USOC as to or upon the words "Olympic", "Olympics", "Olympiad", or any of these words.

Response. See the I.O.C. and U.S.O.C. charters to be produced at the offices of plaintiffs attorney, Vaughn R. Walker, at a mutually convenient time and date.

Request No. 20. All documents that purport to contain any agreement(s) contract(s), memorandum(s) of understanding or other similar material as, by and between USOC and IOC, concerning any of the following subjects:

(a.) fund raising for the 1984 Olympic Games to be held in Los Angeles, California;

(b.) governance of the 1984 Olympic Games to be held in in Los Angeles, California.

Response. (a) No documents exist.

(b) No documents exist.

Request No. 21. All documents containing any minutes, agendas, transcripts, notes or other materials pertaining to any conference, discussion, meeting or conversation between or among two or more agents of USOC, or of IOC, or of both USOC and IOC, insofar as said documents contain any reference to defendants, or to either of them, or to the Gay Games of 1982, as identified in Request 4, above, or to the

decision(s) by you to file this civil action.

Response. See response to Request No. 3.

Request No. 22. A copy of the articles of incorporation, the constitution, the bylaws and any other documents concerning the structure, purposes and/or functions of USOC, including any amendments adopted at any time to said articles, constitution or bylaws.

Response. See response to Request No. 19.

Request No. 23. A copy of the articles of incorporation, the constitution, the bylaws and any other documents concerning the structure, purposes and/or functions of IOC, including any amendments adopted at any time to said articles, constitution or bylaws.

Response. See response to Request No. 19.

Request No. 24. A copy of all financial reports of USOC, including financial statements, statements of assets and liabilities, and income statements, prepared for or in behalf of USOC pursuant to USOC's obligations as a private, non-profit corporation, for each of the years 1976-1982, inclusive.

Response. The United States Olympic Committee will produce responsive documents in the office of its attorney, Vaughn R. Walker, at a mutually convenient time and date.

Request No. 25. A copy of each and every trademark and service mark application ever filed by USOC in the United States, and a copy of every document presented in response to each such aplication by USOC, by the entity or agencyto which application was made, including but not limited to copies of all documents purporting to bestow any trademark or service mark upon USOC, its predecessors, successors or agents.

Response. Copies of five registrations and one application will be produced at the offices of plaintiff's attorney, Vaughn R. Walker, at a mutually convenient time and date. The applications and responses which resulted in issuance of those registrations are publicly available documents in the files of the United States Patent and Trademark Office and,

as such, are as accessible to defendants as to plaintiffs.

UNITED STATES OLYMPIC COMMITTEE

By: Richard G. Kline (Signed)

(Certificate of service omitted.)

File Date: February 9, 1983

(Names & caption omitted in printing, see J.A. 5, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Answers to Defendants' Request for Admissions

Plaintiffs hereby respond to Defendants' Request for Admissions dated November 4, 1982 as follows:

GENERAL RESERVATIONS OF RIGHTS

All answers are accurate to the best of plaintiffs' present knowledge and belief but in the event further proceedings or invetigation should indicate any respect in which any admission or denial needs to be supplemented or modified, plaintiffs reserve the right to serve and file supplemental responses for such purpose.

Any statement made in response to Defendants' Request for Admissions shall be without prejudice to plaintiffs' right to object to the admission in evidence or relevance of such response or its right to object to further discovery of information or documentation relating to the same subject matter upon any valid ground or grounds including without limitation privilege, work product, lack of relevance, lack of materiality, overbreadth, burdensomeness, oppressiveness or incompetence.

1. Plaintiff UNITED STATES OLYMPIC COMMIT-

TEE has received financial assistance from the United States government.

Answer Admitted, in so far as qualified in response to Defendants' Interrogatory No. 23.

2. Plaintiff UNITED STATES OLYMPIC COMMITTEE has plans to use publicly owned facilities located in the State of California in connection with the 1984 Olympic Games.

Answer Admitted, insofar as it may be directed to do so. See response to Defendants' Interrogatory No. 24.

3. Plaintiff UNITED STATES OLYMPIC COMMITTEE has used publicly owned facilities located in the United States in connection with the Olympic Games in the past, in each of those years in which the Olympic Games have been sited and held in the United States.

Answer Admitted, insofar as it may be directed to do so. See response to Defendants' Interrogatory No. 24.

4. Plaintiff UNITED STATES OLYMPIC COMMITTEE has received one or more grants, pledges, gifts, bequests or donations of money, goods, services or a combination of those things from one or more public officials of the City of Los Angeles, in connection with the 1984 Olympic Games to be held in Los Angeles, California in 1984.

Answer Denied. The extent of payments of contributions from any governmental agency has been set forth in the answers to Defendants' Interrogatory No. 23. To the extent the request refers to any officials acting as private citizens, the request is objected to as irrelevant and not calculated to lead to the discovery of relevant evidence, as burdensome in that it would require examination of every single donation to the Olympic Committee and further objects on the same grounds as set out in response a Defendants' Interrogatory No. 6.

5. Plaintiff UNITED STATES OLYMPIC COMMITTEE has received one or more grants, pledgds, gifts, bequests or donations of money, goods, services or a combination of those things from one or more public officials of the States of California, in connection with the 1984 Olympic Games to be

held in Los Angeles, California in 1984.

Answer See response to request to admit No. 4.

6. Plaintiff UNITED STATES OLYMPIC COMMITTEE has received one or more grants, pledges, gifts, bequests or donations of money, goods, services or a combination of these things from one or more public officials of the United States of America or of the United States government, in connection with the 1984 Olympic Games to be held in Los Angeles, California in 1984.

Answer See response to request to admit No. 4.

7. There are at least 300 separate business establishments in the United States that are using the terms "Olympic", "Olympics", "Olympiad" or one or more of these terms in conjunction with the trade or sales of goods or services, or both such trade and sales, as of August 9, 1982.

Answer Plaintiff lacks sufficient information to either admit or deny, and, therefore, denies.

8. There are at least 25 theatrical exhibitions, athletic performances and athletic competitions that have been held in the United States at one or more times during the period from January 1, 1978 to August 9, 1982, and whose sponsors, oganizers or participants have used the terms "Olympic", "Olympics", "Olympiad" or one or more of these terms in writing to promote such exhibitions, performances and competitions.

Answer Admitted. Plaintiff lacks knowledge of the specific number, but believes that there have been more than 25 "Special Olympics" events alone, and more than 25 events in the 1980 Winter Olympic Games in Lake Placid, New York.

9. As of the date of service of this set of requests for admissions, the UNITED STATES OLYMPIC COMMITTEE exercises authortiy as to the persons who may appear and compete in behalf of the United States in the Olympic Games.

Answer Denied, insofar as the request implies that sole authority resides in the Plaintiff United States Olympic Committee. The Olympic Committee's members, the

national governing bodies of each sport, actually conduct the Olympic trials in each sport.

10. One object and purpose of the UNITED STATES OLYMPIC COMMITTEE is to promote and support amateur athletic activities involving the United States and foreign nations.

Answer Admitted.

(Jurat omitted.)

Cause Submitted: March 15, 1983

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Memorandum Opinion

The unpublished opinion affirming the preliminary injunction is reprinted as Appendix 7, pages 81-90, of the Petition for Certiorari.

File Date: April 7, 1983

(Names & caption omitted in printing, see J.A. 5, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

(Title omitted.)

Plaintiffs' First Supplement to Interrogatory Answers

Plaintiff United States Olympic Committee hereby supplements and amends its answer to defendant's Interrogatory No. 27:

Although plaintiff believed at the time of its response that it had paid no income taxes, subsequent investigation disclosed that, on advice of its accountants, a small portion of the Olympic Committee's revenues were treated as unrelated business income, and the following taxes were paid:

1979 — $1,573.18
1980 — $5,221.80
1981 — $3,550.00

UNITED STATES OLYMPIC COMMITTEE
By C. Robert Paul, Jr. (Signed)
Director of Public Information

(Jurat omitted.)

File Date: September 16, 1983

(Names & caption omitted in printing, see J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Notice of Motion and Motion of Plaintiffs for Summary Judgment on the Complaint and Counterclaim

To defendants and their attorneys of record:

Please take notice that on Monday, October 17, 1983, at 10:00 A.M. or as soon thereafter as the matter may be heard, before the Honorable Robert F. Peckham, in Courtroom 12 of the above Court, plaintiffs *INTERNATIONAL OLYMPIC COMMITTEE* and *UNITED STATES OLYMPIC COMMITTEE* will move the Court for an order granting summary judgment in their favor on both the complaint and the counterclaim in this action. This motion is made pursuant to Rule 56 of the Federal Rules of Civil Procedure and on the ground that there is no genuine issue as to any material fact and that plaintiffs are entitled to judgment as a matter of law.

This motion is based on this notice, the memorandum and declarations filed herewith, the proposed order, and all of the records and files in this action.

Dated: September 16, 1983

(Names omitted. See J.A. 5, above.)

By Vaughn R. Walker (Signed)
Attorneys for Plaintiffs
International Olympic Committee
and United States Olympic Committee

File Date: September 16, 1983

(Names & caption omitted in printing, see J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

(Title omitted in printing.)

Plaintiffs' Memorandum in Support of Motion for Summary Judgment

(Indexes omitted in printing.)

PRELIMINARY STATEMENT

Plaintiffs **INTERNATIONAL OLYMPIC COMMITTEE** ("IOC") and **UNITED STATES OLYMPIC COMMITTEE** ("USOC") seek an injunction against defendants under the Amateur Sports Act of 1978, 36 U.SC. § 380. Plaintiffs obtained a temporary restraining order in this matter on August 9, 1982, and this Court granted plaintiffs a preliminary injunction on August 24, 1982. The preliminary injunction was affirmed on appeal by the Ninth Circuit on April 8, 1983.

Discovery closed on September 1, 1983. The existing record establishes plaintiffs' right to summary judgment on its claim for a permanent injunction under the Amateur Sports Act. Because defendants' counterclaim is premised on a finding that the preliminary injunction was improperly issued, plaintiffs are entitled to summary judgment on the counterclaim as well.

I. FACTUAL BACKGROUND

Defendant Waddell began efforts in 1981 to organize a series of athletic games to be held in San Francisco in late August 1982. Waddell formed a corporation for this purpose that he wished to call "Golden Gate Olympic Association,"

but was informed by the California Department of Corporations that "Olympic" could not be used in a corporate title (Waddell Decl., filed Aug. 16, 1982, p. 4). The organization was incorporated under the name "San Francisco Arts & Athletics."

By late 1981, Waddell was aware that the use of "Olympics" to describe his athletic games may constitute trademark infringement, and he wrote to the USOC on December 26, 1981 requesting permission to use the term (Waddell Decl., Exh. A). Three days earlier, USOC executive director F. Don Miller, had sent Waddell a letter advising him of the Amateur Sports Act of 1978 and asking Waddell to discontinue use of "Olympic" (Miller Aff., filed August 9, 1982, Exh. A). The USOC reaffirmed this position after receiving Waddell's letter of December 26 (id., Exh. D).

This Court has already reviewed the various communications between the parties in early 1982 (Order on Prelim. Inj., filed August 20, 1982, pp. 3-5). The relevant point is that at no time did plaintiffs consent to defendants' use of the term "Olympic." In June 1982, the USOC became aware that defendants were referring to their games as the "Gay Olympics" (Kline Decl., filed August 9, 1982, p. 2). Subsequent investigation disclosed that the "Gay Olympics" were to be closely modeled on the Olympic Games in terms of style and format (ibid.). Accordingly, plaintiffs filed this action in this Court on August 9, 1982, to prevent defendants' unauthorized use of Olympic terminology and symbols.

II. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR CLAIM UNDER THE AMATEUR SPORTS ACT.

The Amateur Sports Act provides in relevant part:

"(a) Without the consent of the Corporation [USOC], any person who uses for the purposes of trade, to induce the sale of any goods or services, or to promote any theatrical exhibit, athletic performance, or competition

* * * * *

"(4) the words 'Olympic', 'Olympiad', 'Citius Altiur

Fortius' or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity shall be subject to suit in a civil action by the Corporation for the remedies provided in the Act of July 5, 1946 (60 Stat. 427; popularly known as the Trademark Act of 1946).

* * * * *

"(c) The Corporation shall have exclusive right to use the name 'United States Olympic Committee'; the symbol described in subsection (a)(1) of this section; the emblem described in subsection (a)(2) of this section; and the words 'Olympic', 'Olympiad', 'Citius Altius Fortius' or any combination thereof subject to the preexisting rights described in subsection (a) of this section."

In connection with plaintiffs' claim under this statute, the following facts are undisputed:

1. At no time did plaintiffs consent to defendants' use of Olympic terms or symbols (see Part I, supra).

2. Defendants promoted the "Gay Olympics" as a series of athletic events of an international scope modeled on the original Olympic Games (Waddell Decl., Exhs. J, Y). SFAA itself was organized for "the promotion of sports events within the framework of Olympic style competition" (id., Exh. J).

3. The "Gay Olympics" were to include the carrying of a torch, an opening parade, closing ceremonies and presentation of contestants behind banners and flags of their home cities or countries (id., Exhs. I, J, Y). In a letter to prospective supporters, Dr. Waddell claimed that the opening ceremony would "rival the traditional Olympic Games" (id., Exh. I).

4. The Games were to include at least 10 sporting events that take place in the Olympic Games (id., Exh. J; see Order on Prelim.Inj., p. 9 & nn. 3 and 4). Defendants planned to award gold, silver and bronze medals to the top three competitors in each event (id., Exh. I).

5. The acknowledged intent of defendants was to create

"an Olympic-style format" (id., p. 2), and to "emulate the true nature of an Olympiad" (id., p.9).

6. The Games were to be open to all competitors, regardless of sexual preference (id., p. 9), as are the Olympic Games (Miller Aff., p. 3).

7. The stated goal of the Gay Games — "participation, cooperation, and friendship" (Waddell Decl., Exh. J) — is consistent with the Olympic philosophy set forth in the Olympic Creed — "The most important thing in the Olympic Games is not to win but to take part" (see Order on Prelim. Inj., p. 10).

8. Defendants' long-range goal for the Games is to sever their identity with the gay community and have them open to and identifiable with the entire public generally (Preston Aff., filed August 9, 1982, Exh. A; see Gordon Decl., Exh. B, No. 3).

9. In connection with their promotion of the "Gay Olympics," defendants solicited contributions using the term "Olympic," sold goods including "an official Olympic T-shirt," buttons, bumper stickers and "Olympic" emblems, published an "Olympics" newsletter, and referred to their office as "Olympic Headquarters" (Waddell Decl., and supporting exhibits; Miller Aff., Exh. C*).

Based upon these facts, it is plain that plaintiffs are entitled to summary judgment on their claim under section 380. The factual similarities between the defendants' activities and the Olympic Games are such that defendants' use of Olympic terminology would tend "to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the [USOC] or any Olympic activity" (36 U.S.C. § 380(a)(4)). Proof of actual confusion is unnecessary for this determination (*Golden Door, Inc.* v. *Odisho* (9 Cir. 1980) 646 F.2d 374, 351; *AMF, Inc.* v. *Sleekcraft Boats* (9 Cir. 1979) 599 F.2d

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* Defendants have admitted that the promotional materials attached to the Miller Affidavit as Exhibit C are their own (Gordon Decl., Exh. A, No. 1).

341, 353).

In its memorandum decision of April 8, 1983, the Ninth Circuit indicated, after extensive statutory and historical analysis, that the "tendency to cause confusion" requirement may apply only to combinations or simulations of Olympic terminology and symbols and not to the use of the term "Olympic" itself (Memoraundum, p. 3 & n. 1). Under the predecessor statute to the present Section 380, it was unlawful per se to use the word "Olympic" for any of the proscribed activities, including the inducement of attendance at any athletic performance or competition. As the legislative history plainly shows, these per se prohibitions were carried forward to the present statute:

> "Section 110 of S. 2727 [the present Section 380] would amend section 379 of title 36, United States Code, which provides penalties for unauthorized use of Olympic designations. Presently 36 U.S.C. 379 prohibits unauthorized use of * * * the words 'Olympic', 'Olympiad', or 'Citius Altius Fortius'.
>
> * * * * *
>
> "The amendments made by section 110 of S. 2727, to which our comments are directed, would *add to the list* of designations whose unauthorized use is prohibited * * * (3) a combination, simulation, or confusingly similar derivation of the words 'Olympic', 'Olympiad', or 'Citius Altius Fortius' which would tend to cause confusion, mistake or deception, or which would fasely suggest a connection with the Corporation or any Olympic activity.
>
> * * * * *
>
> "Section 110(a)(4) makes actionable *not only use of the words 'Olympic'*, 'Olympiad', 'Citius Altius Fortius', and any combination thereof, *but also any simulation or confusingly similar derivative thereof* tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic Activity.
>
> * * * * *

> "Section 110 carries forward some prohibitions from the existing statute enacted in 1950 and adds some new prohibitions, e.g. words described in section (a)(4) tending to cause confusion, to cause mistake, or to deceive with respect to the Corporation or any Olympic activity." (H.R.Rep. No. 1627, 95th Cong., 2d Sess. 36-38, reprinted in U.S.Code Cong.& Ad.News 7478, 7494-96) (emphasis added).

Since defendants admittedly used the word "Olympic" both for the purpose of trade and to promote athletic competition, the Court need go no further in order to grant plaintiffs summary judgment. However, even were a "tendency to confuse" the proper standard, such a tendency has been demonstrated by abundant evidence.

Prior rulings of this Court and the Ninth Circuit have laid to rest defendants' contention that they are not subject to section 380 because SFAA is a nonprofit corporation. Section 380 expressly provides protection against the use of "Olympics" to promote, without plaintiffs' consent, "*any* * * * athletic performance, or competition" (emphasis added). It is therefore applicable regardless whether such promotion constitutes a trade or whether it is done for, or results in, a profit. Defendants were, in any event, soliciting contributions and selling products such as T-shirts, buttons and posters under various "Olympic" designations. A nonprofit corporation, such as defendant San Francisco Arts & Athletics, Inc., may carry on business for profit (Cal.Corp.Code, § 5140(1)). Moreover, "[i]t is not necessary, in order to constitute trade or business, that it shall be carried on for profit" (*American Medical Ass'n* v. *United States* (D.C.Cir.1942) 130 F.2d 233, 237, affirmed (1943) 317 U.S. 519).

III. DEFENDANTS' CONSTITUTIONAL DEFENSES ARE WITHOUT MERIT.

Throughout these proceedings defendants have contended that issuance of an injunction would violate their First and Fourteenth Amendment rights because (1) prohibiting their use of Olympic terminology violates their free speech rights,

and (2) this enforcement action discriminates against the gay community in violation of the equal protection clause. As previous rulings in this case have recognized, both of these defenses are without merit.

The First Amendment claim fails because the speech involved in this case is commercial in nature and may properly be enjoined (see *Lloyd Corp.* v. *Tanner* (1972) 407 U.S. 551, 567; *Dallas Cowboys, Etc.* v. *Pussycat Cinema, Ltd.* (2 Cir. 1979) 604 F.2d 200, 206). As the Ninth Circuit held in this case, "There is no first amendment right to use the word 'Olympic' in the title of [defendants'] games so long as there are other adequate means by which [defendants'] can communicate their message" (Mem., p. 3).

The Fourteenth Amendment "discriminatory enforcement" claim is similarly unavailing. Plaintiffs have established that their enforcement activities have not amounted to a violation of defendants' constitutional rights (Kline Supp.Decl. filed August 16, 1982; see Order on Prelim.Inj., pp. 14-15; see also Kline Decl., filed herewith).

An independent basis for rejecting these constitutional claims is that no state action is present (*DeFrantz* v. *United States Olympic Com.* (D.D.C. 1980) 492 F.Supp. 1181, 1193-1194). The fact that an injunction is sought from this Court does not transform the activity into state action (*Interbank Card Ass'n* v. *Simms* (M.D.N.C. 1977) 431 F.Supp. 131, 133).

IV. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THE COUNTERCLAIM

Inasmuch as defendants' counterclaim is premised entirely on a finding that the issuance of an injunction was and is improper, plaintiffs are entitled to summary judgment on the counterclaim as well.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for summary judgment on the complaint and counterclaim should be granted. This Court should enter judgment ordering that defendants, their employees, agents, officers, attorneys and

representatives, all persons participating with or acting in concert with them, and each of them, shall permanently cease, desist and refrain from further use of "Olympic" or "Olympiad" or any confusingly similar word, term, name, trade name or any symbol, emblem, trademark or ensignia of the International Olympic Committee or the United States Olympic Committee, or any combination or simulations thereof, for the purpose of trade, to induce the sale of any goods or services, or in connection with any advertising, promotion, publicity or production of any theatrical exhibition, athletic performance, competition or event pursuant to 36 U.S.C. § 380.

Dated: September 16, 1983.

Respectfully submitted,

(Names omitted. See J.A. 5, above.)

By: Vaughn R. Walker (Signed)
Attorneys for Plaintiffs
International Olympic Committee and
United States Olympic Committee

File Date: September 16, 1983

(Names & caption omitted in printing, see J.A. 5, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

(Title omitted in printing.)

Declaration of Richard G. Kline in Support of Motion for Summary Judgment

RICHARD G. KLINE declares as follows:

1. In addition to serving as one of counsel for plaintiffs in this action, I am Counselor as well as trademark counsel for plaintiff United States Olympic Committee. If sworn as a witness, I could and would of my own personal knowledge competently testify under oath to the matters stated herein.

2. Since my "Supplemental Declaration in Support of Order to Show Cause Re Preliminary Injunction," filed in this matter on August 16, 1982, the United States Olympic Committee has taken substantial action, and has achieved substantial results, in its program to protect its rights to the word "Olympic" and other Olympic-related designations under the Amateur Sports Act of 1978.

3. Since August 1982, the Olympic Committee has made approximately 135 requests to a wide variety of individuals and organizations, seeking their voluntary cessation of unauthorized use of Olympic-related designations and their compliance with the Amateur Sports Act of which approximately 105 related to use of the word "Olympic". Among those written to was the Muscular Dystrophy Association (Exhibit N).

4. Since August 1982 the Olympic Committee has brought further civil actions to enforce its rights under the Amateur Sports Act. These actions include:

a. *United States Olympic Committee v. March of Dimes Birth Defects Foundation,* No. 83-539 (D. Col.). A copy of the judgment permanently enjoining the March of Dimes from unauthorized use of "Olympic" is attached as Exhibit O.

b. *United States Olympic Committee et al. v. Adelman Enterprises,* No. CV-83 2697RG (C.D. Cal.). A copy of the judgment permanently enjoining the defendant from further unauthorized use of Olympic-related designations is attached as Exhibit P.

c. *United States Olympic Committee v. International Federation of Body Builders, et al.,* No. 81-0969 (D.D.C). A copy of the order finding violations of the court's judgment is attached as Exhibit Q.

d. *United States Olympic Committee v. Millsport, Inc. et al.,* No. 82-3239 (D.D.C.). A copy of the judgments obtained in that case are attached as Exhibit R.

5. In addition to the above civil actions, the Olympic Committee has, since August 1982, initiated various proceedings in the United States Patent and Trademark Office to protect its rights under the Amateur Sports Act.

(Jurat and exhibits omitted in printing.)
(Exhibits are in Record, Docket #72.)

File Date: September 16, 1983

(Names & caption omitted in printing, see J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

(Title omitted in printing.)

Declaration of Robert A. Gordon in Support of Plaintiffs' Motion for Summary Judgment

ROBERT A. GORDON declares as follows:

1. I am associated with Pillsbury, Madison & Sutro, counsel for plaintiffs.

2. The documents attached hereto as the following exhibits are true and correct copies of the following materials generated through the discovery process in this case:

Exhibit A: Defendants' Responses to Plaintiffs First Set of Requests for Admissions, served August 31, 1983.

Exhibit B: Defendants' Answers to Plaintiffs' First Set of Interrogatories, served August 31, 1983.

Exhibit C: Letter from counsel for defendants, indicating verifications will be forthcoming, received August 31, 1983.

(Jurat omitted.)

(Exhibits A & B omitted in part in printing. Exhibits A & B are in Record, Docket #73.)

File Date: August 31, 1983

(Names & caption omitted in printing, see J.A. 62 above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

(Title omitted.)

Defendants' Responses to Plaintiffs' First Set of Requests for Admissions
(FRCP Rule 30 and Local Rule 230-3)
EXHIBIT A

To: Plaintiffs INTERNATIONAL OLYMPIC COMMITTEE and UNITED STATES OLYMPIC COMMITTEE and to their attorneys of record:

Defendants SAN FRANCISCO ARTS & ATHLETICS and DR. THOMAS WADDELL respond to your First Set of Requests For Admissions in the above-captioned action as follows:

Request for Admission No. 1: The documents attached hereto as Exhibit A are true and correct copies of defendants' "promotional materials" as that term is used on page 8, lines 25-26 of the Declaration of Thomas F. Waddell, filed August 26, 1982.

Response: Yes. These materials were used promotionally prior to issuance of the temporary retraining order in this action.

Request for Admission No. 2: The circled portion of the document attached hereto as Exhibit B is a true and correct statement made by defendant Thomas F. Waddell.

Response: Denied.

Request for Admission No. 3: The long-range goal of the defendants with respect to the Gay Games was or is as stated in the circled portion of the newspaper article attached hereto

as Exhibit B.

Response: Denied. The long-range goal of the Gay Games is not a matter of policy in respect to its label. However, it is a long-range goal of the Gay Games to include athletic participation for all people regardless of athletic ability, gender, age, race or sexual orientation/preference.

Request for Admission No. 4: The circled portion of the document attached hereto as Exhibit C accurately sets forth an announcement made by defendants.

Response: Yes.

Dated: 31 August 1983

By: Mary C. Dunlap (Signed)
Attorney for Defendants

(Jurat omitted.)

File Date: August 31, 1983

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

(Title omitted.)

Defendants' Answers to Plaintiffs' First Set of Interrogatories
(FRCP Rule 33 and Local Rule 230-1)
EXHIBIT B

To: Plaintiffs INTERNATIONAL OLYMPIC COMMITTEE and UNITED STATES OLYMPIC COMMITTEE and to their attorneys of record:
Defendants SAN FRANCISCO ARTS & ATHLETICS and DR. THOMAS WADDELL respond to your First Set of Interrogatories in the above-captioned action as folows:

Interrogatory No. 1: If you have not admitted without qualification all of the matters stated in Request for Admission No. 1, please state all your reasons for your denial or qualification.

Answer: Not applicable.

Interrogatory No. 2: If you have not admitted without qualification all the matters stated in Request for Admission No. 2, please state the following:

(a.) All your reasons for your denial or qualification; and

(b.) Your best recollection of the statement made to the reporter on this matter.

Answer: (a.) I did not suggest to Mr. Art Rosenbaum that the name of the future Games should be the People's Olympics or that I was in any position to change it thusly.

(b.) In the phone conversation between myself and Mr.

Rosenbaum which resulted in the column reproduced as "Exhibit B", I suggested to Mr. Rosenbaum that these Games were not so much a "Gay" olympics as they were a "People's" olympics, implying that the issues addressed by these Games (ageism, racism, sexism, nationalism) applied to a broader representation than just a sexual orientation.

Interrogatory No. 3: If you have not admitted without qualification all of the matters stated in Request for Admission No. 3, please state the following:

(a.) All your reasons for your denial or qualificaiton; and

(b.) What the defendants' long-range goals are with respect to the participation and interest of the general population in the Gay Games.

Answer: (a.) Request for Admission No. 3 requests a response to the statement, "the long-range goal of the defendants with respect to the Gay Games was as stated in the circled portion of the newspaper article attached hereto as Exhibit B." If this statement refers to returning the word "gay" to its dictionary meaning, then this is clearly *not* a "goal" of the Gay Games; it is my personal attitude. If the statement refers to the change of the name to "People's Olympics", then this too is *not* a "goal" of the Gay Games. If the statement refers to the Gay Games' long-range goals of providing an athletic competition and a means of self-fulfillment for everyday people doing everyday things, then this is a long-range goal of the Gay Games.

(b.) The long-range goals of the defendants with respect to the participation and interest of the general population in the Gay Games have as their primary source the "Purpose and Scope" which constitute Article L of the By-laws for the California non-profit corporation known as San Francisco Arts & Athletics Inc., which states: "The specific and primary purpose is to deliver and administer cultural activities within the Bay Area. Particular emphasis shall be placed on public education serving the needs of racial, ethnic, cultural and sexual minorities."

The Gay Games in 1982 were one project of SFA&A towards its stated goals. Future plans for Gay Games will be the task of the Board of Directors of SFA&A.

Another source of the long-range goals of the defendants is the opinion of Thomas F. Waddell, M.D., named also as a defendant in this action. (See Declaration of Thomas F. Waddell filed in opposition to Plaintiff's Motion for Preliminary Injunction in this action.)

Interrogatory No. 4: With respect to the Gay Games, please set forth:

(a.) An itemization of all gross revenues received to date;

(b.) An itemization of all expenses to date;

and

(c.) All profits earned to date.

Answer: (a.)-(c.) Attached to these Answers to First Set of Interrogatories to Defendants are copies of relevant documents from which the answer to Interrogatory No. 4 may be derived.

Interrogatory No. 5: With respect to defendants counterclaims filed August 27, 1982, please set forth the amount of damages defendants have suffered as claimed in paragraph 3 of your prayer for judgment.

Answer: $43,118.00

Interrogatory No. 6: With respect to the figures set forth in response to Interrogatory No. 5, please set forth:

(a.) A breakdown or itemization of the figures together with the manner of calculating such figures; and

(b.) All facts in support of your allegation that defendants have been damaged in that amount.

Answer:

(a.) *Item of damage:*	*Amount:*
1. human resources diverted to legal defense and litigation	incalculable
2. time diverted to compliance with TRO/injunction	incalculable
3. potential ticket sales lost due to belief that Games had been cancelled	incalculable

4. anticipated revenues from sales of posters, products, etc.		
2500 Gay Olympic Games buttons (unit cost $.293		*Retail values:* $ 2,500.00
200 original serigraphs donated to Gay Olympic Games by artist (unit cost: donated) (collectors item)		30,000.00
800 original singed silk screen friezes of Gay Olympic Games (unit cost: $450 (30% to artist))		8,400.00
250 T Shirts 16 sweat bands 6 tank tops 7 shirts 9 sweats	(unit cost: $750.00)	2,218.00
	Total damages:	$43,118.00

(b.) Until the temporary restraining order was placed upon us in relation to the Gay Games there had been the successful sale of items of the types listed above and there was the anticipation of the revenues from the new collectors' series of posters. The potential revenues from the sale of these items were to serve as our resource for the activities of Gay Games week. Since these items had been popular and successful, we relied on their continued quick sale. Along with the sudden drop in ticket orders as a result of the TRO, the Games products also declined and we were left with the aforementioned products, posters and buttons which, containing the word "Olympic", became unmarketable.

Interrogatory No. 7: If you have not admitted without qualification all of the matters stated in Request for Admission No. 4, please state the following:

(a.) All your reasons for your denial or qualification; and

(b.) Your best recollection of the announcement to which the circled portion of the document attached hereto as Exhibit C refers.

Answer: Not applicable.

Dated: 31 August 1983

Thomas F. Waddell (Not Signed)
Defendant/Cross-plaintiff.

VERIFICATION

I, THOMAS F. WADDELL, do hereby declare under penalty of perjury: I am a defendant and cross-plaintiff in the above-entitled action. I have read the foregoing answers to Plaintiff's First Set of Interrogatories To Defendants, and know the contents thereof. The same are true and correct of my own personal knowledge.

(not executed or signed)

EXHIBIT C

MARY C. DUNLAP

Attorney at Law
(415) 587-8320

425 Staples Avenue
San Francisco, Ca 94112

August 31, 1983

To: All Counsel in *International Olympic Committee et al. v. San Francisco Arts & Athletics Inc. et al.* C-82-4183 RFP

From: Mary C. Dunlap, Counsel (initial omitted) for Defendants/Cross-plaintiffs

On this date you were served with unverified, unsigned copies of the answers to interrogatories and responses to requests for admissions that were served upon defense counsel by mail on July 29, 1983. Due to unavoidable time problems, the answers and responses will be verified and signed, and copies

of the verifications and signatures will be sent to you, as soon as possible. Thanks for understanding.

File Date: October 3, 1983

(Names & caption omitted in printing, See J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Summary Judgment

(Indexes omitted in printing.)

I. INTRODUCTION

Defendants and cross-plaintiffs San Francisco Arts & Athletics Inc. ("SFAA") and Dr. Thomas Waddell ("Dr. Waddell") oppose the motion of International Olympic Committee ("IOC") and United States Olympic Committee ("USOC") for summary judgment on the grounds that (1.) there *are* triable disputes of material fact in this action and (2.) IOC and USOC are *not* entitled to judgment in their favor as a matter of law. Defendants SFAA and Dr. Waddell contend that the moving papers by IOC and USOC misstate record materials in a manner that disguises triable disputes of material fact, and that the moving papers mischaracterize principles and authorities as to relevant constitutional and trademark law.

II. CERTAIN MATERIAL FACTS *ARE* DISPUTED AS TO PLANTIFFS' CAUSE OF ACTION BASED UPON THE AMATEUR SPORTS ACT OF 1978.

In dictum in its opinion upholding this Court's preliminary injunction at bar, the U.S. Court of Appeals for the Ninth

Circuit suggested that, where a party uses the word "Olympic" for trade, in sales or certain promotions, 36 U.S. Code 380(a), USOC might not be legally obligated to prove that the use of "Olympic" is one "tending to cause confusion...". (Memo. opinion p.3 & n.1 (4/8/83)). That dictum contains no reasoning or authority as to the implications of such a reading of 36 U.S. Code 380(a) for first amendment purposes. Defendants contend that for this Court to adopt the above-cited reading of section 380(a) of the Amateur Sports Act would depart significantly from the declared purposes of Congress in making that enactment, and would heedlessly and unnecessarily create a conflict between the statute and the constitutional guarantee that "Congress shall make *no* law...*abridging the freedom of speech*...". U.S. Const. Amend. I (emphases added).

In enacting 36 U.S. Code section 380, Congress did not prohibit *all* uses of "Olympic" for which the user does not have the consent of USOC. *S.T.O.P. v. USOC*, 489 F.Supp. 1112, 1119-1120 (S.D.N.Y. 1980). In granting the preliminary injunction in the case at bar, this Court agreed with the District Court in the *S.T.O.P.* case that "section 380 does not establish a *per se* rule against the unauthorized use of the word 'Olympic'...". (Order p. 8 (8/20/83)).

If this Court were to interpret section 380 to permit USOC to prohibit *any* use of "Olympic" in conjunction with trade, sale or certain promotions, section 380(a), that interpretation would imbue Congress with the intent to empower USOC to become the arbiter of all uses of "Olympic" that are associated with any publication, advertising, notice, announcement or other medium that involves any commercial element. Such interpretation places section 380 on a collision course with decisions of the U.S. Supreme Court that hold that a subsidiary commerical element in a communication cannot render it unprotected speech. *See, e.g., New York Times v. Sullivan*, 376 U.S. 255, 265-266, 84 S.Ct. 710, 718, 11 L.Ed.2d 686 (1964)(Paid advertisement soliciting contributions for Dr. Martin Luther King, which was basis

for $500,000 libel award, was held to be speech protected by first amendment; "defamation" claims by public officials were observed to be a potential backdoor restraint upon free speech); *Murdock v. Pennsylvania*, 319 U.S. 105, 112, 63 S.Ct. 870, 87 L.Ed. 1292 (1943)(Court invalidated license tax on Jehovah's Witnesses' literature because sales of that literature were "merely incidental and collateral" to the group's principal aim of dissemination of religious beliefs). Defendants contend that such a reading of section 380 literally and unconstitutionally would empower Congress to give away words, and to bestow upon other entiities the power to punish uses of those words that the entities (or Congress) do not authorize. It is difficult to imagine a more frontal assault upon the first amendment prohibition of Congressional abridgement of free speech.

Until the enactment of 36 U.S. Code section 380, "Olympic" was a word that USOC could not lawfully trademark, nor enforce the claimed trademark upon, because "Olympic" was (and is) a generic, ancient word, in widespread use by persons and entities unrelated with USOC; USOC's inability to resist certain trademark applications was an origin of the bill's intent. *U.S. Code Cong. & Admin. News* 7494-7497 (1978); *see Anti-Monopoly Inc. v. General Mills Fun Group, Inc.*, 684 F.2d 1316, 1321- 1327 (9th Cir. 1982) cert. denied, U.S. (1982). In enacting section 380, Congress bestowed a most unusual and otherwise unattainable trademark upon USOC as to this word. *Id.* To interpret section 380 to reach further, bestowing more than a protectible trademark upon USOC by disregarding the tests of confusion etc. built into section 380 in express terms and by reference to the Trademark Act, simply would invite an unnecessary conflict with the first amendment.

Moreover, in the case at bar there is no question that the part of section 380 that refers to "...any combination or simulation thereof tending to cause confusion..." is the part of the statute upon which USOC's and IOC's claim depends. There is not a stitch of factual support for the proposition

that defendants have used or proposed to use "Olympic" *by itself* in trade, for sale or for certain promotions identified in section 380. All record evidence establishes without ambiguity that defendants used and proposed to use the terms "Olympic" and "Olympics" *in combination with* the term "Gay". "Gay" was used to refer to a certain group of persons definable, or self-defined, by reference to sexual orientation/affectional preference. *Cf. Cyr v. Walls*, 439 F.Supp. 697, 699 n.2 (N.D. Tex. 1977) (Ex. G to Dec. T. Waddell Opp. Mo. Preliminary Injunction (below, Dec. Waddell)). Accordingly, unless the part of section 380 that refers to "...any combination or simulation thereof tending to cause confusion...[etc.]" is to be rendered meaningless,[1] and unless this Court is to ignore the record evidence that plainly establishes that defendants used "Olympic" and "Olympics" in combination with other words, to describe and identify the first international Gay "Olympic" Games, the dictum in the Court of Appeals' opinion upholding this Court's preliminary injunction, concerning proof of tendency to confuse, cannot be validly and correctly read to preclude proof of that tendency in the case at bar.

The remainder of the arguments in this part of this memorandum rely upon the assumption that this Court will require plaintiffs to prove tendency to confuse as required by section 380 when "Olympic" is used in combination with terms that are not part of USOC's trademarks. Defendants also note that the instant motion relies expressly upon the "tending to cause confusion" clause of section 380, and not upon any other clause of that section (eg. mistake, deception, false suggestion).

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[1] Counsel for defendants does not use the term "meaningless" lightly in this context. If the Court of Appeals' view, that tendency to confuse need not be proved in order for USOC to secure the remedies provided by the Trademark Act in *any* case of use of "Olympic" in trade, etc., were accepted by this Court, then that language would be effectively excised from section 380.

A. Tendency to confuse must be proved, and it is disputed as a matter of fact.

As contended above, USOC must prove that defendants' use of "Olympic" was or would have been one "tending to cause confusion" as set forth in section 380. See argument above pp.2-5. The question of tendency to confuse is factual, and there is a dispute as to it of record in the case at bar. (Compare Dec. Waddell p.3 lines 22-24; p.8 lines 6-24; p.11 lines 10-24; Ex's. H, J p.2 (re purposes of Games); Ex DD to Dec.M.Evans Opp. Mo. Prelim. Inj. (re purpose of SFAA); Dec.P.Mart Opp. Mo. Prelim. Ing. p.2 lines 8-11; Dec. E.Petersen p.2 lines 6-12, with plaintiffs' assertion that they have proved a "tendency to confuse" beyond factual dispute, at Pltf.Memo.Supp.Mo.S.J. p.8 lines 2-4). It is obvious that there is a central material fact at issue in this case, and that it is disputed, to wit., whether SFAA's and Dr. Waddell's use of "Olympic" was or would be one "tending to cause confusion" as required to be shown by section 380. This triable dispute of material fact precludes issuance of summary judgment in favor of plaintiffs in this action. Rule 56(c) of the *Federal Rules of Civil Procedure* thus requires trial upon plaintiff's Amateur Sports Act cause in the case at bar.

B. Defendants' intent as to use of "Olympic" and as to the relationship between the Gay Games and the USOC/ Olympics raises a triable dispute of material fact in this action.

As part of its findings in support of its issuance of a preliminary injunction in this action, this Court declared that "...the long range goal of the sponsors of [the Gay Games of 1982] is apparently to sever the Games from their direct connection with the gay community altogether". (Order p.9) Defendants vigorously and emphatically dispute that inference by this Court as to the intent of Dr. Waddell or others associated with SFAA. Indeed, in response to a request by USOC and IOC for an admission by Dr. Waddell as to the correctness of the newspaper article's attribution of language to Dr. Waddell upon which this Court's inference

relied (Order p. 9 lines 21-29), Dr. Waddell denies that the attributed statement was true or correct, and he expressly *denied* that "[t]he long range goal of the defendants with respect to the Gay Games was or is as stated in the [newspaper article cited]". Responses of T. Waddell to Requests for Admissions, at Ex. A pp.1-2 to Dec.R.Gordon Supp.Mo.S.J.).

Yet in their memorandum in support of motion for summary judgment, IOC and USOC dare to assert that it is an "undisputed" fact that "Defendants' long-range goal for the Games is to sever their identity with the gay community and have them open to and identifiable with the entire public generally...", citing "Gordon Decl., Exh. B, No. 3." (Memo. Supp.Mo.S.J. p.5 lines 7-11). The cited portion of the exhibit to the Gordon declaration states:

> "*Request for Admission No. 3*: The long-range goal of the defendants with respect to the Gay Games was or is as stated in the circled portion of the newspaper article attached hereto...
>
> *Response: DENIED.* The long-range goal of the Gay Games is not a matter of policy in respect to its label. However, it is a long-range goal of the Gay Games to include athletic participation for all people regardless of athletic ability, gender, age, race or sexual orientation/ preference." (emphasis added)

Genuine issues of material fact, such as Dr. Waddell's intent, do not disappear in the context of a motion for summary judgment by means of misstatements as to parties' answers to requests for admissions, such as the gross misstatement contained in the list of purportedly "undisputed" facts offered by plaintiffs to this Court, cited above. Counsel for defendants also notes that other allegedly "undisputed" facts offered by plaintiffs simply read statements and materials in distorted ways, out of context and without the accompanying details that contradict the inferences that plaintiffs urge. (See Memo.Supp.Mo.S.J. numbers 2, 3, 7 & 9, pp.4-5). For purposes of this aspect of

plaintiffs' motion, it is sufficient for defendants to point out that their declarations in opposition to the motion for preliminary injunction filed in 1982 raise triable disputes of material fact as to the intent of Dr. Waddell and other sponsors and founders of the Gay Games, as to the distinctions between the Games' purpose, philosophy and format and those of the Olympics, and as to the reasons for the use of "Olympic" by those who were participants in the planning and promotion of the Gay Games in 1982. (See declarations cited *supra* p. 6 lines 7-11) To infer that the goal of non-discriminatory participation is equivalent or connected to a severing of the Gay Games from the gay community, as plaintiffs apparently would cause this Court to do over the protestations of defendant Dr. Waddell as to what his *own* intent was and is, also is quite illogical and unfair. The gay community is diverse, and to include persons in an activity associated with it regardless of sex, age, race, physical ability or sexual orientation is certainly *not* tantamount to severing the gay community connection; instead, it is expanding the definition of the relevant group, *inter alia*, to assure inclusion of heterosexual supporters and proponents of the rights of lesbians and gay men along with those persons. The inference that plaintiffs have urged and that this Court originally and mistakenly accepted as to Dr. Waddell's intent, in conjunction with its reasoning as to evidence of "tendency to confuse", is an inference that has the potential of dividing and destroying any civil rights movement's momentum, by the simple *reductio ad absurdum* that as soon as the persons who are discriminated against reach outside their own ranks for support, they are "severing their ties" with the relevant community. The policy implications of this line of reasoning must be considered by this Court in this action, if it is to do justice in the interpretation of the Amateur Sports Act and of relevant federal constitutional guarantees in this case. In any event, the matter of Dr. Waddell's relevant intent in the use of "Olympic" in conjunction with the Gay Games and in the purposes and philosophy of the Games obviously raises

triable disputes of material fact, insofar as plaintiffs' burden is to prove that the use of "Olympic" was one tending to cause confusion, as section 380 prescribes.

III. IOC AND USOC ARE *NOT* ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THEIR AMATEUR SPORTS ACT CAUSE OF ACTION.

A. Defendants' use of "Olympic" is permitted by the exception for "fair use in description" contained in the Trademark Act, 15 U.S.Code section 1115(b)(4).

Defendants SFAA and Dr. Waddell claim that even if USOC and IOC were able to meet their statutory burden with the requisite proof of tendency to cause confusion in the case at bar, defendants are statutority entitled to use "Olympic" as they did prior to the issuance of the injunction, based upon defendants' right, assuming *arguendo* that USOC's trademark is incontestable, to use the ancient, descriptive and generic word "Olympic" in good faith to describe the "goods or services" of SFAA, to wit., the Gay Olympic Games. Even the holder of an incontestable trademark cannot lawfully enjoin another party from using the trademarked term *"fairly and in good faith only to describe* to users the goods or services of such party..." 15 U.S.Code sec. 1115(b)(4) (emphasis added): *see, e.g., Soweco, Inc. v. Shell Oil Co.*, 617 F.2d 1178 (5th Cir. 1980), cert.den. 101 S.Ct. 1516 (1981); *Polo Fashions Inc. v. Extra Special Products Inc.*, 451 F.Supp. 555 (D.N.Y. 1978)(defendant's commercial use of word "polo", descriptively, could not be enjoined, although use in conjunction with plaintiff's distinct typestyle and label colors was an infringement that could be enjoined); *Gracious Lady Service Inc. v. Welcome Wagon International Inc.*, 295 F.Supp. 1373 (W.D.Pa. 1969)(defendants' use of phrase "gracious ladies" in advertisments as to its similar service could not be enjoined); *Abercrombie & Fitch Co. V. Hunting World Inc.*, 537 F.2d 4 (2nd Cir. 1976)(where term is not used *as a trademark*, but for description, there is no infringement even as to an

otherwise incontestable trademark). At a minimum the application of this statutory defense raises several triable disputes of material fact in this case. The issues of the nature of the use of "Olympic", its descriptive and identifying purpose, the good faith with which it was used and to be used and related issues arising out of the application of 15 U.S.Code sec 1115(b)(4) to the case at bar cannot be disposed of without trial herein.

Nor can there be any serious doubt that the defenses of the Trademark Act of 1946 apply in this litigation. If this Court were to hold that the defenses of that Act do not apply, it would be giving USOC something *better* than an incontestable trademark as to the word "Olympic"—it would be awarding USOC a license to govern the use of the word itself, even as against those who might use "Olympic" in good faith fairly to describe goods or services in no conceivable way related to the functions or interests of USOC. Defendants contend that to exclude the Trademark Act defenses from application in the instant case would contradict the intent of Congress in enactment of section 380. *See U.S.Code Cong. & Adm.in.News* 7494-7497, cited supra p.4; *S.T.O.P. v. USOC*, 489 F.Supp. at 1119-1120. It would also attribute an intent to Congress to empower an entity (here, USOC) to abridge free speech, in that it would award a license to USOC to prohibit *any* use of "Olympic" in conjunction with trade, sale or certain promotions, no matter how subsidiary and irrelevant the commercial element of the party's use of "Olympic" might be, and it would thus create unnecessary and severe constitutional problems with section 380, discussed briefly at pp. 2-4 above.

By ignoring the defense asserted by SFAA and Dr. Waddell in opposition to the plaintiffs' motion for injunctive relief in 1982, under section 1115(b)(4) of the Trademark Act, this Court then placed defendants in a *worse* position than that which would have been held by a commercial competitor using a term claimed to be subject to an incontestable trademark under the Lanham Act. There was and is *no*

reason for such mistreatment of defendants by this Court. The intent of SFAA and Dr. Waddell in using "Olympic", and their allegations that they used this word in good faith fairly to describe the upcoming events and activities of the Gay Games of 1982 to prospective participants and supporters, cannot be swept aside in favor of summary judgment to plaintiffs under their section 380 claim, unless this Court is willing to place a nonprofit corporation using a word that legally cannot be trademarked (absent Congressional aid) for philosophical and descriptive purposes in a worse position, in terms of the balances and principles of trademark law, than a commercial competitor using an incontestable trademark term would hold. *Cf. AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979)(Court of Appeals stressed the importance of weighing evidence of intent and purpose in determining whether trademark has been infringed and what the remedy should be as an equitable matter).

B. The duty of this Court to reconcile the Amateur Sports Act with constitutional guarantees cannot be fulfilled if plaintiffs' speech-infringing interpretation of their rights under that Act is accepted by this Court.

SFAA and Dr. Waddell sincerely and emphatically contend that the use of "Olympic" to identify, describe and promote the international Gay Games of 1982, with its express philosophy of overcoming homophobia and challenging discrimination against gay men and lesbians, by means of an all-encompassing participation of supportive people of every sexual orientation, race, sex, age and condition in a healthful, colorful athletic competition, constituted a clear exercise of freedom of speech that should have been held constitutionally protected. The interpretation of section 380 of the Amateur Sports Act that IOC and USOC so far successfully have urged upon this Court does not meet this free speech claim head-on, nor even propose a reconciliation with it; rather, the interpretation urged by plaintiffs flatly discards the free speech interests that are and have been advanced by defendants at bar.

Counsel for SFAA and Dr. Waddell respectfully submits that, in noting the differences between the instant case and *S.T.O.P.* (cited pp.2-3 *supra*) this Court so far has overlooked or neglected powerful and constitutionally significant similarities between the instant case and *S.T.O.P.* In both cases a non profit publicly interested group that was openly critical of USOC and the Olympics used the world "Olympic" for symbolic political and philosophical purposes in the course of its lawful activities. The word had and was intended by its users to have an altogether distinct meaning, reference and context from the Olympics for which USOC raises funds, governs amateur athletic opportunity and engages in other activities. Neither group operated in a manner that was designed or even likely to suggest any connection with USOC or the Olympic Games. In regard to this factual similarity, counsel respectfully reminds this Court that in February 1982, counsel for defendants offered to USOC to place an *express* disclaimer on *all* Gay Olympic Games materials and properties, with an asterisk by "Olympic" and a label reading "not associated with the U.S. Olympic Committee"; USOC rejected this proposal. (Dec.R.Kline Supp.Mo.Prelim.Inj. Ex.'s C & D). Yet, unlike the nonprofit group in *S.T.O.P.*, defendants here have suffered an injunction effectively prohibiting them from using the word "Olympic".

The interest of SFAA and Dr. Waddell and others enjoined in using the word "Olympic" as a part of their freedom of expression is no less worthy of legal protection than was that interest which the District Court found a statutory means of protecting in the *S.T.O.P.* decision. This interest in freedom of expression cannot be cast aside, consistent with the guarantee of the first amendment. This Court is respectfully urged in behalf of the defendants to review its reading of the Amateur Sports Act in light of the constitutional precedents governing speech, where one party claims that the speech involved is unprotected because it is commercial while the other party establishes that the commercial element is subsidiary to protectible political,

philosophical or other express, or even that the otherwise "commercial" nature of the speech does not preclude its passing of information and ideas to those receiving the communication. In these cases, the Supreme Court firmly and often has protected speech against prohibition via the claim that it is "commercial" (except in cases of obscenity and false advertising, not at issue herein). *See, e.g., New York Times v. Sullivan* and *Murdock v. Pennsylvania*, cited p. 3 *supra*; *Virginia State Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748 (1976)(Court invalidated state statute prohibiting pharmacists from advertising prices of prescription drugs); *Linmark Associates v. Township of Willingboro*, 431 U.S. 748 (1977)(Court struck down local ordinance prohibiting posting of "For Sale" and "Sold" signs). Plaintiffs' unanalytical and categorical response to this strong line of authority, by which plaintiffs simply assert that "[t]he First Amendment claims fail because the speech involved in this case is commercial in nature and may be properly enjoined (citations omitted)" (Memo.Supp.Mo.S.J. p.9) does not take into account nor correctly read these Supreme Court decisions *protecting* even unambiguously commercial speech in cases where it provides information and/or ideas alongside serving its pecuniary purpose. Thus, even assuming *arguendo* that the facts at bar were to show that a primary purpose of defendants in using "Olympic" to identify and promote the Gay Games was "commercial", thus removing the case from the rule in *New York Times* and *Murdock*, *supra*, no authority or reason has been proposed to establish why these defendants—unlike the commercial entities in *Virginia Board* and *Linmark Associates*—are nonetheless not entitled to the same protection of their purportedly "commercial speech". In lofting the plaintiffs' view of the Amateur Sports Act higher than the first amendment's guarantee of free speech, even in commercial contexts, this Court would be placing an Act of Congress above the first amendment, which is precisely what the first amendment prohibits, in its terms. *See also*, discussion of

protection of "commercial speech" in L. Tribe, *American Constitutional Law* 651-656 (The presence of hard cases in this area is "an insufficent reason either to return to the unprincipled extreme of excluding all commercial speech from first amendment protection (footnote omitted), or to embrace the equally indefensible position that government cannot prevent [7-Up sold as if it were insulin]...".

IV. DEFENDANTS' COUNTERCLAIMS RAISE TRIABLE DISPUTES OF MATERIAL FACT WHICH, IF RESOLVED IN DEFENDANTS' FAVOR, WILL ENTITLE DEFENDANTS TO JUDGMENT AGAINST PLAINTIFFS.

A. The issue of state action is a mixed question of fact and law, which cannot be resolved in favor of plaintiffs at this state, and which must be tried.

> "Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance."
>
> —*Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

Defendants contend that USOC is engaged in state action; plaintiff USOC disputes this. State action is the prerequisite to the imposition of constitutional responsibilities upon USOC, and the determination of whether that prerequisite is fulfilled must depend upon the trial of facts as to the functions, purposes and relationship to government of USOC. Defendants contend that Congress' chartering and special empowerment of the U.S. Olympic Corporation, as well as the provision of funds to USOC including ten million dollars ($10,000,000.) for compensation of claimants of injuries arising from not sending a team to Moscow in 1980 and six and three-tenths million dollars ($6,300,000.) for minting of Olympic coins (see Pltf.Ans.Def.1st Set Interrogs. #23, pp.15- 16), and USOC's staging of and participation in the 1984 Olympics render USOC a government actor, using

public resources and special powers bestowed by the federal government to perform a public function. The opinion in *DeFrantz v. USOC*, 492 F.Supp. 1181 (S.D.N.Y. 1980), in which the District Court held only that USOC had not been engaged in governmental action in deciding to boycott the Moscow Olympics, did not decide or reach the question whether USOC is doing state action in its determinations as to who may or may not use the word "Olympic". It is also important that the District Court in *DeFrantz* specifically criticized plaintiff's reliance there on state action precedents from the area of "discrimination" law; the instant case is in the center of that body of law. (See sections IV. B. and C. *infra*) Even assuming *arguendo* that USOC is a private entity performing a public function, and not a literal arm of the US government (a factual issue, awaiting trial to be properly resolved), USOC may be responsible for constitutional violations committed in the course of its performance of that public function. *See, e.g., Evans v. Newton*, 382 U.S. 296, 299 (1966)(provision of park held to be public function for constitutional purposes); *Marsh v. Alabama*, 326 U.S. 501 (1946)(company town's trespass law could not be used to prosecute Jehovah's witness distributing literature there). Where an entity is charged by Congress with the performance of particular functions, and is given special resources in order to perform them, from government, the entity should be held responsible to respect the constitutional rights of those it affects by its behavior. *See* cases cited *supra*; *see also Burton v. Wilminton Parking Authority* cited p. 16 *supra*; *Cf. Fortin v. Darlington Little League* 514 F.2d 344, 347-348 (1st Cir. 1975)(Local Little League was held to be doing state action for purposes of application of equal protection guarantee to require it to admit females to the teams; Little League's Congressionally chartered nature noted).

B. The defendants' counterclaim for violation of their first amendment rights raises triable disputes of material fact.

Defendants' First Cause of Action of their counterclaims

against USOC and IOC alleges that USOC brought suit against SFAA and Dr. Waddell because of an intent and desire on plaintiffs' part to suppress and limit defendant's freedoms of expression and association, by means of removing the word "Olympic" from all references to the Gay Games of 1982 and any other activities by SFAA. (Answer & counterclaims, para's 5, 9, 10, 17 & 18, pp.10-12 (8/27/82); Dec.Waddell Opp.Mo.Prelim.Inj. p. 5 lines 15-22; pp. 10-11) Defendants contend that USOC and IOC have made a content based adverse judgement as to the conjunction between the word "Olympic" and defendants and their cause, and that they have enforced that adverse content-based judgement via this litigation, by means that accomplished a prior restraint and censorship, and that seriously damaged defendants. Further factual support for defendants' claim of violation of their first amendment rights, beyond Dr. Waddell's declaration cited above, can be found in USOC and IOC documents produced via discovery and presented with this opposition memorandum. (See Dec.M.Dunlap Opp.Mo.S.J. at Exhibits A-C thereof) Thus, the First Cause of Action of defendants' counterclaims cannot properly be disposed of by means of a motion for summary judgment, because its material allegations as to the infringements upon defendants' freedoms of speech and association are disputed, and must be tried.

Defendants also contend that if USOC is found to be engaged in state action relevant to this litigation, its *denial* of consent to defendants to use "Olympic", when requested in December 1981, constitutes a distinct and actionable infringement and abridgement of defendants' freedoms of expression and association. A governmental actor is constitutionally prohibited under the first amendment from denying a resource or facility to a gay/lesbian group that it has afforded to other non-gay groups, even if the resource or facility need not have been provided to anyone in the first place (and is a "limited public forum"). *Student Coalition for Gay Rights v. Austin Peay State University*, 477 F.Supp.

1267 (M.D.Tenn. 1979)(gay/lesbian group of students denied recognition were entitled to it from university officials); *Alaska Gay Coalition v. Sullivan*, 578 P.2d 951(Alaska 1978)(city directory's omission of gay/lesbian group from listings denied free expression and was disallowed); *Gay Lib v. University of Missouri*, 416 F.Supp. 1350 (W.D.Mo. 1976), reversed, 558 F.2d 848 (8th Cir. 1977), cert. denied *sub nom Ratchford v. Gay Lib*, 434 U.S. 1080 (1978)(university's denial of recognition to student group violated first amendment rights of group and members); *Toward A Gayer Bicentennial Committee v. Rhode Island Bicentennial Foundation*, 417 F.Supp. 632 (D.R.I. 1976)(Use of state building as forum to present diverse historical and cultural offerings precluded group from excluding gay/lesbian offering in convocation, as a first amendment matter); *Gay Alliance of Students v. Matthews*, 544 F.2d 162 (4th Cir. 1976)(denial of recognition of student group by Virginia Commonwealth University held to violate freedom of association of gay/lesbian group); *Gay Students Organization of the University of New Hampshire v. Bonner*, 509 F.2d 652 (1st Cir. 1974)(GSO was denied facilities to hold dance and conference, although it had been recognized as a student organization by university officials; court held that this treatment by officials deprived gay/lesbian group of its rights of free speech, association and assembly); *Wood v. Davison*, 351 F.Supp. 543 (N.D.Ga. 1972)(denial of permission for gay conference and dance held to violate freedom of expression of those involved in the activities); *cf. Fricke v. Lynch*, 491 F.Supp. 381 (D.R.I. 1980)(the right of a high school student to attend senior prom with his male companion was upheld as free expression). As in the above cited cases, the rights of free expression and association that are infringed by the denial of consent by USOC to defendants to use "Olympic" are precious rights, that must not be trivialized by reference to a cynical or biased view of the importance of the first international Gay Olympic Games; such trivialization constitutes censorship by its effect.

Plainly, defendants' First Cause of Action cannot be disposed of at this stage pursuant to plaintiff's motion. Issues of state action, intent, effect of the denial of consent and effect of the issuance of a preliminary injunction as to use of word "Olympic" raise triable disputes of material fact at this stage.

C. The defendants' counterclaim for unconstitutional discrimination raises triable disputes of material fact.

Defendants' Second Cause of Action of their counterclaims against USOC and IOC alleges that plaintiffs intentionally and purposefully have acted to discriminate against defendants and other lesbians and gay men by (1.) denying consent to SFAA and Dr. Waddell to use the word "Olympic" as requested, and (2.) litigating this action and seeking injunctive relief against the first international "Gay Olympic Games" and other activities of SFAA. (Answer & counterclaims para's 5, 9, 10, 19&20, pp.10-13; Dec.Waddell Opp.Mo.Prelim.Inj. p. 2 ll.20-28, p.4 ll.3-19, p.7 ll.7-15, p.10 ll.5-28, p.11 ll.1-24). Defendants contend that USOC's denial of consent to them to use "Olympic" and USOC's and IOC's bringing of suit and seeking of injunctive relief against such use were and are motivated by homophobic reactions to defendants, to gay men and lesbians generally and to the prospect of any use of "Olympic" by such people. Further factual support for this claim of discrimination of defendants, beyond Dr. Waddel's declaration as cited above, can be found in USOC's and IOC's documents produced via discovery and presented with these opposition papers. ("See Dec.M.Dunlap Opp.Mo.S.J. at Ex's A-C thereof). The Second Cause of Action of defendants' counterclaims thus cannot properly be disposed of by motion for summary judgment, because its material allegations as to discriminatory treatment of the Gay Games and their sponsors vis a vis other "Olympics" (eg. the Special, Junior, Police, Armenian and other "Olympics" expressly or tacitly permitted by USOC), and as to the invidious motive of USOC in denial of consent to defendants and the discriminatory intent of

USOC and IOC in bringing suit and seeking injunctive relief against defendants' use of "Olympic" are disputed, and must be tried.

The legal authorities upon which defendants' equal protection claim are based have been cited for the most part in Part IV. B. of this memorandum *supra* pp. 19-20 (express equal protection models were applied in *Gay Alliance v. Matthews*, 544 F.2d at 167, citing *Police Department of City of Chicago v. Moseley*, 408 U.S. 92 (1972)(different treatment of speakers by City police triggered application of equal protection as well as first amendment); *GSO v. Bonner*, 509 F.2d at 655 (injunction prohibited defendants from restricting GSO's use of university facilities and from treating GSO 'differently than other other University student organizations'); *Fricke v. Lynch*, 491 F.Supp. at 388 (court holds that a higher level of scrutiny than merely whether the government has a 'rational basis' is required, because Mr. Fricke alleges and has shown intrusion upon his fundamental first amendment right of free expresion).

The authorities cited by defendants firmly establish that freedom of gay men and lesbians and of non-profit public interest groups representing and serving these persons from discrimination by governmental actors, at least where such discrimination burdens exercise of a fundamental right, must be protected, unless both a compelling governmental interest served by the restriction upon speech and association and the absence of a non-discriminatory alternative are shown by the governmental actor. (USOC has offered neither at bar, preferring to rest on the assertion that it and IOC owe no constitutional duties to defendants at bar.)

V. THE PERMANENT INJUNCTION FOR WHICH IOC AND USOC HAVE PRAYED IN THIS CASE WOULD BE IMPROPER, BOTH CONSTITUTIONALLY AND EQUITABLY SPEAKING, EVEN IF THEY WERE ENTITLED TO SUMMARY JUDGMENT IN THEIR FAVOR IN THIS ACTION.

The remainder of this memorandum assumes *arguendo* that this Court determines to grant summary judgment to plaintiffs, in spite of the absence of fulfillment by their case of the two prerequisites for such a judgment set forth in Rule 56(c).

A. An order permanently prohibiting defendants from any use of "Olympic" for trade, sale or certain promotions unnecessarily would infringe upon their first amendment rights.

The necessity of considering free speech implications in trade and commercial regulation cases, including trademark infringement cases, repeatedly has been recognized by the federal courts. *See, e.g., Better Business Bureau* v. *Medical Directors Inc.*, 681 F.2d 397, 405 (5th Cir. 1982); *In the Matter of R M. J,* U.S. , 102 S.Ct. 929 (1982); *Fur Information Case*, 364 F.Supp. 16,22 (S.D.N.Y. 1973), aff'd. on other grounds, 501 F.2d 1048 (2nd Cir. 1974), cert. denied, 419 U.S. 1022 (1974), cited with approval in *S.T.O.P., supra*, 489 F.Supp. at 1125. As those cases amply demonstrate, the fact that neither party to a trade regulation suit is found to be engaged in governmental action or under color of law does not minimize the first amendment considerations involved in the issuance of injunctive relief that restrains speech, even in those unambiguously commercial contexts.

For example, in *Better Business Bureau, supra*, the District Court found that the defendant weight-reducing clinics had used the trade name of the Better Business Bureau, in ads *falsely* representing that a satisfied customer of one of the clinics had been a Better Business Bureau "investigator", in a manner that the Court found to violate the Lanham Act. The Court of Appeals affirmed the findings and the result, but, relying significantly upon *In the Matter of R M. J, supra*, the Court of Appeals modified the injunction against references to the Better Business Bureau from prohibition to permitted use, requiring a disclaimer of association, and said modification of the injunction was expressly made on first amendment grounds. Surely in the case at bar, where the

context of regulation of speech is far from purely commercial, and where the interest of defendants in freedom to use the ancient, generic term upon which USOC claims a trademark is at least as strong as the weight-reducing clinic's interest in mentioning the Better Business Bureau, an injunction permitting use of the word with disclaimer is mandated by the first amendment, if any injunctive relief whatsoever is permissible. *See also, Virginia Board of Pharmacy supra* pp. 14-15, in which the Supreme Court noted as to false advertising cases that it may be "appropriate to require that a commerical message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive", 425 U.S. at 772 n.24, but noting that the prohibition of "prior restraints" of the first amendment will generally prevent prohibitory injunctions in such cases, unless *irreparable* harm of false advertising can be shown.

B. No injunction requiring a disclaimer is necessary, in that defendants agreed and remain willing to accompany any future use of "Olympic" with a disclaimer.

Defendants note that they agreed to use a disclaimer of any association with USOC in February 1982, in writing, and they remain willing to abide by that assurance in any future use of "Olympic". (See Dec.R.Kline Sup.Mo.Prelim.Inj. Ex's C & D). Because defendants remain willing to abide by that assurance voluntarily, without necessitating any court order, there is no need for any permanent injunction in this case. Injunctive relief is only available, as a matter of equity, where a party otherwise will act to violate the would-be terms of the injunction, or where there is some demonstrable danger of such violation. Where declaratory relief suffices to resolve the matter, also, injunctive relieve is improper. *See e.g., Doe v. Bolton*, 410 U.S. 179, 188-189 (1973); "Developments in the Law: Declaratory Judgments - 1941-1949", 62 *Harv.L.Rev.* 787, 805-817 (1949). Even assuming *arguendo* that this Court were to find a summary judgment in favor of plaintiffs in this case to be warranted, in spite of the triable disputes of

material fact that permeate the action, and in spite of the considerable authority that would entitle defendants to judgment in this action, the sole type of permanent injunction that would be proper under the first amendment—one requiring a disclaimer or warning by SFAA—is unnecessary and improper in this action, because defendants already have agreed and they here reiterate the agreement to provide disclaimers of association with USOC and the Olympics in any materials or property that use the word "Olympic".

VI. CONCLUSION

For the reasons presented above, the motion by plantiffs for summary judgment should be denied, and the action set for trial.

Dated: 3 October 1983

Respectfully submitted,

By: Mary C. Dunlap (Signed)
An Attorney for Defendants and
Cross-Complainants SFAA & Dr. Waddell

(Certificate of service omitted in printing.)

File Date: October 3, 1983

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Mary C. Dunlap
In Opposition to Plaintiff's Motion for Summary Judgment

I, MARY C. DUNLAP, do hereby declare under penalty of perjury:

1. I am an attorney of record for defendants in the above captioned action.

2. The documents attached hereto as the following exhibits are true and correct copies of documents produced by plaintiffs in response to defendants' first request for production of documents:

EXHIBIT A: Note and article to Richard G. Kline
EXHIBIT B: Correspondence between Monique Berlioux of IOC and Mr. Douglas Roby
EXHIBIT C: Correspondence with Mr. Darwin Mittelstaedt

3. If called to testify I would competently testify to the above.

Dated: October 3, 1983

Mary C. Dunlap (Signed)

Dick,

In follow up to our discussion over the hot fudge sundae last week in Indianapolis. I found the enclosed article in the SF Chronicle of 7/28.

I believe the article says quite a bit. We may not like it, but it's the way San Francisco is looking at it.

Regards,
Bob (signed)

(Articles omitted in printing. Articles are in Record, Docket #78.)

EXHIBIT A p. 1
to Declaration of Mary C. Dunlap

II-248

Mr. Douglas ROBY
Fairview
6100 Geddes Road
YPSILANTI
Michigan 48197
U.S.A.

Lausanne, 2nd August 1982
Ref. no 6151/82/nmm

Re: "Gay Olympics"

Dear Mr. Roby,

Thank you very much for your letter and enclosure of 21st July, 1982.

We are well aware of this unfortunate situation regarding the proposed "Gay Olympics" in the United States. We have been in close communication with the USOC on this matter and can assure you they will have the full support of the IOC should they decide to proceed with legal action to obtain an injunction prohibiting further use of the word "Olympics" by this organisation.

Thank you again for providing us with the news cutting and for expressing your concern on this matter.

Best regards.

Yours sincerely,

Monique BERLIOUX
Director

EXHIBIT B p. 1
to Declaration of Mary C. Dunlap

Douglas F. Roby
Fairview
6100 Geddes Road
Ypsilanti, Michigan 48197
(313) 482-1093

July 21, 1982

Dear Madame Berlioux:

I am enclosing to you copy of news article in the "Detroit Free Press" of this date, regarding "GAY OLYMPICS".

I suppose you know that the word "GAYS", in this country means "HOMOSEXUALS".

In recent years these people have come out *in* the *open* in many ways and seem to be attempting to have "SODOMY", considered as a virtue.

I called Don Miller, on the phone today to make sure that he is aware that the U.S.O.C. attorneys are seeking an "INJUNCTION" in the court of law.

With best regards,

Cordially,
Douglas F. Roby (signed)

EXHIBIT B p. 2
to Declaration of Mary C. Dunlap

II-250

Mr. Darwin MITTELSTAEDT
1505 North Franklin Place
MILWAUKEE, Wisconsin 53202
U.S.A.

Lausanne, 2nd March 1982
Ref. no 1932/82/GS/ab

Re: "Gay Olympic Games"

Dear Mr. Mittelstaedt,

Thank you for your letter of 11th February 1982.

The IOC fully approves the position adopted by the United States Olympic Committee and draws your attention to the fact that the Olympic terminology is protected in the USA by Section 110 of the Amateur Sports Act, 1978, so that any user of the word "Olympic" needs the prior consent of the appropriate authority.

This consent is not unreasonably withheld, as is shown by the examples quoted in your letter.

Yours sincerely,

Monique BERLIOUX
Director

cc. Colonel F. Don MILLER
bcc. Mr. Georges STRASCHNOV

EXHIBIT C p. 1
to Declaration of Mary C. Dunlap

II-251

February 11, 1982

Monique Berlioux, Director
International Olympic Committee
Chateau de Vidy
CH-1007 Lausanne Switzerland

M. Berlioux,

Enclosed is a copy of a letter I have sent today to Mr. Miller of the United States Olympic Committee.

I thought I might bring to your attention the concern I feel for this situation.

Thank you.

With sincerity,

Darwin Mittelstaedt (Signed)

1505 North Franklin Place
Milwaukee, Wisc 53202
USA

EXHIBIT C p. 2
to Declaration of Mary C. Dunlap

EXHIBIT C p. 3
to Declaration of Mary C. Dunlap

February 11, 1982

F. Don Miller, Executive Director
United States Olympic Committee
1750 East Boulder Street
Colorado Springs, CO 80909

Mr. Miller,

I have read about the warning you sent to the people of the Gay Olympic Games in San Francisco. It is very disappointing to find that the Olympic Committee is so unyielding in guarding exclusive rights to the title "Olympics."

It also seems a blatant instance of discrimination, which angers and offends. Gays cannot be the only group you have advised of your potential for legal action, but these people ought to be given a chance to personally state their case to you.

Gays have as much right to the word "Olympic" as do the mental retarded and police officers.

(Personally, I believe that the word must belong to posterity as well as to history. Certainly it will be as dignifiaby treated in public use as by the hack advertisers of sports equipment and lemonade beverages.)

Please reconsider your position on the gay peoples' ban. Your sense of fair play is being invited and appealed to.

Most respectfully,

Darwin Mittelstaedt, (Signed)

File Date: October 7, 1983

(Names & caption omitted in printing, see J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Plaintiffs' Reply Memorandum in Support of Motion for Summary Judgment

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I. SECTION 380 PROHIBITS USE OF THE TERM "OLYMPIC" HERE WITHOUT REGARD TO A FINDING OF CONFUSION.

Defendants incorrectly contend that in order to grant plaintiffs summary judgment, the Court must hold that section 380 prohibits defendants' use of "Olympic" without regard to any "tendency to cause confusion." There is, as noted in our opening memorandum (pp. 6-8), substantial authority to support the Ninth Circuit's suggestion (Mem.Opn., p. 3 fn.) that section 380 prohibits use of the term "Olympic" for certain purposes regardless of a "tendency to cause confusion." Defendants erroneously argue that such a reading of section 380 would be unconstitutional, but they cite no applicable authority. The Ninth Circuit's rationale for rejecting defendant's constitutional attack on the preliminary injunction—that "[t]here is no first amendment right to use the word 'Olympic' in the title of [defendants'] games so long as there are other adequate means by which [defendants] can communicate their message"—applies with equal force to defendants' constitutional argument here.

The case of *Stop the Olympic Prison* v. *U.S. Olympic Com.* (S.D.N.Y. 1980) 489 F.Supp. 1112 is not to the

contrary. There the court rejected an enforcement claim under section 380 because the alleged infringer was not using the term "for the purpose of trade," or "to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance or competition" (489 F.Supp. at 1121). Here, by contrast, it is undisputed that defendants were using Olympic terminology for such purposes, and the proscription of the statute is thus plainly applicable.

Defendants attempt to avoid this result by claiming that their use is a "combination or simulation," to which the "tendency to cause confusion" standard applies, because their use of Olympic terminology is in combination with the word "Gay." To so twist the statute would render section 380 protections meaningless.* Moreover, the record is replete with defendants' descriptions of "Olympic" T-shirts, buttons, emblems and headquarters without the preceding term "Gay" (Waddell Decl., and supporting exhibits; Miller Aff., Exh. C).

II. IN ANY EVENT, THE UNDISPUTED EVIDENCE ESTABLISHES A TENDENCY TO CAUSE CONFUSION.

Even if the Court were to hold that a "tendency to cause confusion" must be shown in this case, there is sufficient, undisputed evidence to meet this standard.

Defendants contend that summary judgment is inappropriate because the question whether their use tended to cause confusion is a material fact at issue in the case (Def.Mem., p. 6). While the determination of the factors relevant to this standard may involve a factual inquiry, the conclusion whether a tendency to cause confusion has been established is a legal determination (*Golden Door, Inc.* v. *Odisho* (9 Cir.

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*Under defendants' view, an athletic event promoted as the "Olympic Games" would not be subject to the stricter proscriptions of the statute, but instead would have to be tested under the tendency to cause confusion standard, whereas an event promoted as the "Olympics" would be so tested.

1980) 646 F.2d 347, 350). Defendants cannot resist summary judgment simply by registering their disagreement with a question of law.

From all the undisputed facts we listed to support a finding of a tendency to cause confusion (Pl.Opng.Mem., pp. 4-5), defendants' only dispute is a semantic one. Defendants take issue with our choice of words in stating that participation in the Gay Games without regard to the participants' sexual orientations or preferences reflects an intent to "sever" the games from the gay community (Def. Mem., pp. 6-9). Yet defendants concede the very point: their games, like the Olympics, are open to all (Compare: Defs.Mem., P. 7, lines 23-24 with Miller Aff., p. 3). Defendants' quibble is too trivial to preclude summary judgment. In light of the abundant evidence relevant to the confusion issue—all of which is undisputed by defendants—summary judgment under section 380 is plainly appropriate.

III. DEFENDANTS' "FAIR USE" ARGUMENT IS INAPPLICABLE.

Defendants' "fair use" argument is simply another species of the argument that section 380 is unconstitutional. Section 380 incorporates the *remedies* of the Lanham Act, but it does not incorporate the *defenses* of that statute. Congress has already decided, in effect, that the term "Olympic" is not generic or descriptive when used in certain contexts as are presented here, or, in any event, that plaintiffs are nevertheless entitled to exclusive use of the term. To contest this right, defendants would have to show that the statute is unconstitutional. Defendants do not even allege this much, contending instead that the statute may be unconstitutitonal only as applied to them. In any event, the Ninth Circuit in this case has already considered and rejected any claim of unconstitutionality.

IV. DEFENDANTS' COUNTERCLAIMS DO NOT RAISE TRIABLE ISSUES OF FACT.

Defendants' counterclaims are premised entirely on a

finding that issuance of the preliminary injunction was improper. Defendants claim that their First Amendment rights were violated (an issue laid to rest by the Ninth Circuit), and that plaintiffs are guilty of "unconstitutional discrimination" in withholding consent of use of the term "Olympic" and in prosecuting this action.

The undisputed evidence shows that these claims are completely unfounded. First, defendants' activities are plainly within the ambit of the statutory proscriptions and subject to the relief provided for therein. Second, the abundant evidence on the similarities of defendants' activities to the Olympic Games makes this an obviously suitable case for enforcement. Third, the undisputed evidence of plaintiffs' other enforcement efforts establishes that no discrimination has occurred here.*

Accordingly, summary judgment is also appropriate with respect to the claims in defendants' counterclaim.

V. DEFENDANTS' OVERBREADTH AND DISCLAIMER ARGUMENTS ARE WITHOUT MERIT.

Defendants' arguments that the injunction is or would be overbroad as a violation of the First Amendment or as failing to permit the use of a disclaimer have already been briefed to and rejected by the Ninth Circuit ("The injunction accords with the provisions of 36 U.S.C. § 380 and is not overbroad"). These arguments should be rejected again now.

Better Business Bureau, etc. v. *Medical Directors* (5 Cir. 1982) 681 F.2d 397, upon which defendants rely, does not support the use of the term "Olympics" to describe defendants' games or the use of that name or its symbols in selling products. On the contrary, the court affirmed an injunction *against* use of the Better Business Bureau trademark. It modified that injunction to permit a factually correct statement which incidentally mentioned the Better Business

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*Plaintiffs, of course, do not concede that an affirmative claim for relief exists for allegedly discriminating enforcement under the statute, and defendants cite no authority supporting such a proposition.

Bureau provided there was a disclaimer of approval by the Bureau. As the Ninth Circuit noted, the preliminary injunction did not prevent defendants from making factually correct statements about the Olympics. Nor does the proposed permanent injunction. There is also no support for defendants' argument in *In Re R.M.J.* (1982) 455 U.S. 191. The Supreme Court in that case recognized that "[m]isleading advertising may be prohibited entirely" (455 U.S. 203). The undisputed evidence on the confusion issue in this case makes defendants' reliance on *In re R. M. J.* futile.

The disclaimer argument is similarly unavailing. Allowing defendants to use "Olympic" while disclaiming association with the Olympic Committee would eviscerate the Amateur Sports Act, which requires the Olympic Committee's consent to use "Olympic" designations to promote athletic competitions. If permitted, anyone could circumvent the law and use "Olympic" designations without obtaining permission of the Olympic Committee merely by disclaiming any affiliation. This would not only impair the requirement for authentication by the Olympic Committee, but also make it impossible to control any misuse of "Olympic" and would seriously interfere with the purpose of the Act: to finance the Olympic Committee's activities from private sources through licensing of "Olympic." It would be inconsistent with this purpose to protect unauthorized users, such as defendants, by adopting their suggestion of a disclaimer.

CONCLUSION

For the foregoing reasons, and the reasons set forth in our opening memorandum, plaintiffs' motion for summary judgment on the complaint and counterclaim should be granted.

Dated: October 7, 1983

Respectfully submitted,

(Names omitted.)
By ROBERT A. GORDON (Signed)
Attorneys for Plaintiffs
International Olympic Committee
and Unitd States Olympic Committee

(Certificate of service omitted.)

File Date: February 2, 1984

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE: THE HONORABLE J.P. VUKASIN, JUDGE

INTERNATIONAL OLYMPIC COMMITTEE, ETC., AND UNITED STATES OLYMPIC COMMITTEE, ETC.,

PLAINTIFFS AND CROSS-DEFENDANTS,

VS.

SAN FRANCISCO ARTS & ATHLETICS, INC., AND DR. THOMAS WADDELL,

DEFENDANTS AND CROSS-PLAINTIFFS.

No. C-82-4183-JPV
San Francisco, California
Hearing on Motion for Summary Judgment:
Reporter's Transcript
By Vivian A. Pella

APPEARANCES:

FOR PLAINTIFFS:

VAUGHN R. WALKER
ROBERT A. GORDON
PILLSBURY, MADISON & SUTRO
225 BUSH STREET
SAN FRANCISCO, CALIFORNIA 94120

FOR DEFENDANTS:

MARY C. DUNLAP
425 STAPLES AVENUE
SAN FRANCISCO, CALIFORNIA 94112

Thursday, February 2, 1984 **Morning Session**

The Clerk: Calling Civil Matter C-82-4183, International Olympic Committee versus San Francisco Arts & Athletics, Inc.

Will counsel please step forward and state their appearances.

Mr. Walker: Good morning, your Honor —

The Court: Just a minute, please. I'm going to ask all counsel to step forward. Step to the microphone and introduce yourselves. State your name slowly and clearly and spell it.

Mr. Walker: Good morning, your honor. My name is Vaughn, V-A-U-G-H-N, Walker, W-A-L-K-E-R. I represent the plaintiffs.

The Court: Thank you, Mr. Walker.

Mr. Walker: With me is Robert Gordon, G-O-R-D-O-N.

The Court: Thank you.

Ms. Dunlap: Good morning, your Honor. Mary Dunlap,

Ms. Dunlap: *(cont.):* D-U-N-L-A-P, representing the defendants and with me is Dr. Thomas Waddell who is one of the defendants in the action.

The Court: Who's that?

Ms. Dunlap: Dr. Thomas Waddell. He's one of the defendants in the action.

The Court: Thank you.

Ms. Dunlap: Thank you, your Honor.

The Court: All right. The matter is on this morning's calendar and it has been described variously as plaintiff's motion for summary judgment or plaintiff's motion for an Order making the preliminary injunction heretofore issued a permanent injunction, is that right?

Mr. Walker: I think that's a fair description, your Honor, of the effect of granting summary judgment in this matter.

The relief we seek is injunctive relief and nothing but injunctive relief.

This Court has previously issued a preliminary injunction which was presently in effect and binding upon the defendants. That determination has been affirmed by the Ninth Circuit. The —

The Court: There was a preliminary injunction —

Mr. Walker: Yes, sir.

The Court: —Enjoining defendants from using the word "Olympics" —

Mr. Walker: That is correct, your Honor.

The Court: — In connection with the athletic context that they were proposing?

Mr. Walker: That is correct.

The Court: And that preliminary injunction was appealed to the Ninth Circuit —

Mr. Walker: That's correct.

The Court: — And affirmed?

Mr. Walker: That's correct.

The Court: And now you're seeking that the preliminary injunction be made permanent and that summary judgment be granted?

Mr. Walker: That's correct, your Honor.

The Court: You're the moving party. Do you want to say anything in addition to what your papers have said to the Court?

Mr. Walker: I would say only this, your Honor, reserving of course the right of replying to any arguments made by the defendant.

The Ninth Circuit's opinion in this case, I believe, has set forth the law with respect to Section 380 of the Amateur Sports Act and has determined that the Act itself is constitutional, that it applies to the conduct of commercial, theatrical or athletic performances in which Olympic terminology and its symbols are used. And that certainly is what the defendants have sought to use Olympic terminology for. There's no dispute about that. And I think there is no dispute about any of the other factual issues in the lawsuit as distinguished of course what the legal issues are where there was a dispute where that — which the Ninth Circuit has ruled in the plaintiffs' favor.

So I would not add anything other than perhaps the one observation, your Honor: The defendants have stated in their papers that somehow or other this case is different from many other cases in which Olympic terminology is infringed upon for commercial purposes, because the purposes here are "laudatory" as Judge Peckham stated, to project a more realistic view of homosexuals. But a worthy cause use of Olympic terminology is just as prohibited by the Amateur Sports Act as a commercial use as witnessed the fact that the Olympic Committee has compliance with the Act by the March of Dimes and the Muscular Dystrophy Organization which has sought to use Olympic terminology and symbols for their laudatory purposes as well. I think that has a bearing on the Court's decision.

The Court: Ms. Dunlap?

Ms. Dunlap: Thank you, your Honor. The motion of plaintiffs' in this matter represents a real misuse of summary judgment law. Rule 56 of the Federal Rules of Civil

Ms. Dunlap: (cont.): Procedure requires that in order for a party to receive summary judgment, to put it colloquially, to win without a trial, there must be no triable dispute of material fact, and that party much be entitled to judgment as a matter of law.

The case at bar is simply replete with issues of material fact that are not only triable but that must be disposed of on the merits if justice is to be done and if the law is to be applied.

It is the essential position of the plaintiffs in this matter that the defendants' use of the word "Olympic" in conjunction with the Gay Games of 1982 or on the face of it or without further inquiry violates Section 380 of 36 U.S. Code what's known as the Amateur Sports Act.

But any even superficial examination of that law reveals that the use of the term "Olympic" must tend to cause confusion, mistake, deception or false suggestion of some relationship between the user's activity and the Olympic Games or the Olympic Committee.

In the case at bar we submit, and we've briefed the issue, but I want to reemphasize it, that the U.S. Olympic Committee has never proved "a tendency to confuse" in this case. Judge Peckham used the word "presume" in finding a preliminary injunction appropriate. He certainly did not find that the defendants had proved a "tendency to confuse." And as long as there's a dispute of material fact as to that particular issue this case cannot be disposed of if the Rules are to be followed without a trial.

Also integral to the determination by this Court of whether or not Section 380 has been violated and whether or not a permanent injunction is proper is the question of the defendants' intent in the use of the word. I rely upon the Ninth Circuit's decision in *A.M.F. vs. Sleekcraft Boats* for the proposition that evidence of partys' intent and purpose in using an otherwise trademark term is crucial in determining whether infringement has occurred and what the remedies should be.

Accordingly, Mr. Walker's position that somehow the

Ms. Dunlap: *(cont.)*: purposes of the Gay Games sponsors in using the word "Olympic" are irrelevant or umimportant in the determination of whether or not there has been an infringement is not only unsupported but contradicted by relevant law.

This Court has before it a difficult dispute in which it's plain on the face of it that the word "Olympic" is generic, and had the purpose of the Act not been to bestow trademark upon the U.S. Olympic Committee, it's very plain from the legislative history of the Amateur Sports Act that the U.S. Olympic Committee would have no right to go to court whatsoever to defend its trademark.

What are the boundaries on that right to defendants' trademark? We sumbit that the outer boundary is the U.S. Olympic Committee cannot, under any circumstances, have an injunction that requires another party not to use the word whatsoever. We have submitted, and I reemphasize at this point, that even were this Court to find that there's no triable dispute of the material facts as to the tendency to confuse, as to the intent of the parties, as to the state action which is crucial to the constitutional questions, as to whether there's been discrimination, and I offer in that regard that there's never been any rebuttal by the U.S. Olympic Committee.

For example, the Police Olympics, an international competition featuring athletic events using five rings, I understand two of them are handcuffs, but they're rings all the same, has not been in any way brought to account for its obvious — in the U.S. Olympic Committee's definition infringement of a trademark.

In short, your Honor, this case is also replete with triable and profound issues of material fact as to discrimination and as to the requirement not only that the U.S. Olympic Commitee not discriminate in performing their governmental function, but that the Court not discriminate in performing the governmental function of deciding whether to issue an injunction and what the terms of that injunction might be.

My clients find themselves in the rather awkward position

Ms. Dunlap: *(cont.):* of being treated worse than a commercial trademark infringer whose purpose would be shown to be mislead the public. And in this regard the case law, the *Better Business Bureau* case, *In Re*, I think it's *R.M.J.*, I think those initials can be used, and in other cases which we cite with the proposition of which the Supreme Court has underscored that even in a case where an injunction is appropriate, that injunction must be tailored to avoid the invasion of first amendment rights has not been applied to this case.

So there is a body of well-developed trademark law and a body of well-developed constitutional law neither of which body of law has been employed to resolve the dispute now before the Court in a manner consistent with the principles stated in that body of law.

My clients indeed are in the difficult position of having it be almost impossible to explain the results in this case were summary judgment granted without reference to something other than the facts, other than the law and other than justice, namely, perhaps the prestige that we know of the United States Olympic Committee, the International Olympic Committee, and the love that people cherish the world around for the Olympic events.

Now, those factors, those public interest factors, those political factors if the Court wishes to call them, that surely ought to make a difference in the case. It surely matters that the U.S. Olympic Committee comes before this Court seeking to protect a trademark on the basis of which it finances the U.S. —

The Court: On the basis of what? I didn't hear you.

Ms. Dunlap: The U.S. Olympic Committee comes before this Court seeking to protect a trademark on the basis of which it finances the U.S.'s participation in the Olympic Games. There is no question that the interest with the U.S. Olympic Committee —

The Court: Excuse me. Excuse me.

Ms. Dunlap: Yes, your Honor.

The Court: I'm going to have to ask you to slow down a little bit.

Ms. Dunlap: I'm sorry.

The Court: I'm having trouble understanding —

Ms. Dunlap: Yes.

The Court: — What you're saying.

Ms. Dunlap: Okay.

The Court: And if I'm having trouble understanding what you're saying I can't help but believe that the best court reporter in the world might even be having trouble understanding you.

Ms. Dunlap: Fair enough, your Honor. I apologize to the Court and to the court reporter. Let me slow down.

The U.S. Olympic Committee has a vital interest, no question about it, in the use of the term "Olympic." At the same time that vital interest cannot be held to disguise or minimize the interest of every citizen in the full and fair enforcement of the first amendment; the interest of every citizen in the equal enforcement of trademark law.

Let me make one observation in that regard. Throughout this litigation there has been a blitheful disregard of the defendants' serious and litigatable and colorable trademark law-based defense. Defendants claim in this case, among other things, that they have a right specifically spelled out in Section 1115(b)(4) of the Lanham Act to fairly use the term "Olympic" in description. And "Olympic" was used in conjunction with the Gay Games to describe not as a noun but as a description or as an adjective to describe those events that would occur at the Games.

The descriptive use of an otherwise — in context to the trademark term is specifically protected under the Trademark Act and that all matters here at this juncture —

The Court: Wait a minute. I have to interrupt you.

You're saying something that I have trouble with. You're talking Trademark Act and trademark law, trademark policies and philosophies of this country. But we have a unique situation here which takes it out of the typical

The Court: *(cont.):* trademark-type of litigation.

You have the Amateur Sports Act of 1978 and specifically the Section 380 of that Act which *inter alia* rests in the U.S.O.C. exclusive rights to the term "Olympic" and imposes civil liability under the Trademark Act, under the Trademark Act not under the Amateur Sports Act. But it imposes civil liability under the Trademark Act upon any person who uses such term without U.S.O.C. consent to promote any athletic performance or competition.

So it's not a typical Trademark Act case. The plaintiffs here are seeking to enforce a law enacted by the Congress of the United States of 1978 which creates a unique and different situation, a typical industrial or commercial-type trademark dispute.

Ms. Dunlap: Well, your Honor, there are two difficulties with that mode of analysis in the plaintiffs' position in this case. The first which I think is an overwhelming difficulty is that in the Court's reading of the Act the Court has omitted the language causing — tending to cause confusion, mistake, deception or false suggestion. The bottom line tests of impropriety —

The Court: Just a minute. Just a minute. I'm not ignoring or tending to cause confusion standard but hasn't the Ninth Circuit already ruled on that in the appeal of this case by pointing out — reading the confusion standard as modifying the plain term "Olympic" to use their word "awkward construction"?

Ms. Dunlap: Well, your Honor, I don't believe they have ruled on that question for two reasons:

The first is that they were not presented in the appeal on the preliminary injunction. With the case on the merits that is to say they were not presented with all the evidence by both sides presented by both parties by means of adversary proceeding as to whether a "tendency to confuse" has been proved.

Secondly, their interpretation of the statute necessarily would read out the language tending to cause confusion. In

Ms. Dunlap: *(cont.)*: any case if they were to be interpreted to me that the U.S. Olympic Committee could cause any individual under any circumstances who came within the framework of using the word to promote or for trade, from any use of the word Olympic. If that were Congress' intent then why would they have modified the trademark rights that they bestowed by requiring — tending to cause confusion, mistake and so forth would be proved.

In short, your Honor, to ignore that the Lanham Act must be interpreted harmoniously where the Amateur Sports Act is to put aside that the U.S. Olympic Committee was not giving a right under Section 380 to preclude all uses even all commercial uses of the word Olympic, but was only given the right of action upon a potentially infringing use.

In short, your Honor, what Congress certainly did not do is that it did not entitle the U.S. Olympic Committee to bypass civil procedure such as it could go to court without a trial and without a contest and walk in and say they're using the word "Olympic" in a context which although not to profit involves an element of commerce and that's the end of the matter.

I believe that there are very good reasons to require that the interpretation of Section 380 be harmonious with the interpretation of the Lanham Act.

Let me go further, your Honor. If it were the position of the Court that the Ninth Circuit has said that Congress may give away a word by bestowing a trademark appointed entity for that word then there would be a most serious and profound constitutional question of a first amendment nature as to the power of Congress to do so. We have not reached that dispute yet in this case because there are a series of both trademark and constitutional law-based defenses and counterclaims to the U.S. Olympic Committee's position that must first be disposed of factually and by trial before one reaches that question.

But the ultimate underlying and I will say overwhelming constitutional issue in this case when all others are disposed

Ms. Dunlap: *(cont.):* of is whether Congress has a right to give an entity even as prestigious and as powerful as the U.S. Olympic Committee a word, and the word let me add that is more ancient, far more ancient, twenty-seven hundred years old if one trusts the *Oxford English Dictionary*, that a word that is far more ancient and far more generic than many words such as "monopoly" and "opry" and other words which in fact have been found not to be, in spite of being protectable, not to be subject to an absolute protection on the part of the party having an interest in them.

Therefore, your Honor, even were this Court to find that the Ninth Circuit's dictum as to "tendency to confuse" is convincing in its statutory logic and we believe for the reasons I presented in my brief, that very logic puts the Amateur Sports Act on a headlong collision course with the first amendment.

The Court: To be decided by a court higher than this one.

Ms. Dunlap: It will be decided by this one in the first instance, your Honor, and then I suppose we go higher. But we start with the trial court and we start with the realization that the trial court must decide the factual questions related to a constitutional dispute as readily as it must decide on this question related to a statutory dispute.

The Court: Okay.

Ms. Dunlap: Thank you, your Honor.

The Court: Thank you.

Mr. Walker, rebuttal?

Mr. Walker: Very briefly, your Honor.

We are not marching into this Court seeking to obtain a judgment in this action. It has been very seriously and heatedly contested. The trouble with defendants' argument however, the contest here is a contest about legal issues not about factual issues.

And in the argument which counsel has presented she has not pointed out what issues this Court were to try if it were to deny summary judgment and set this matter down for trial.

The "tendency to confuse" issue which she raised that is a

Mr. Walker: *(cont.)*: legal question. Whether there is a "tendency to confuse" or not, the facts from which the Court makes that determination have not been contested. It's not been contested, for example, that the defendants' games are open to all participants just like the Olympic Games are without regard to race, or sexual preference, that there's a similarity of opening ceremonies that the defendants have a torch lighting and carrying ceremony, very similar to that which the Olympic Games have. That there's a similarity of events that the participants march behind the banners of their countries or cities. That the games are international in scope and that the winners are awarded gold, silver and bronze medals just like the Olympics. None of those matters, which are factual matters, are not in dispute.

Ms. Dunlap indicated that — again indicated her disagreement with what Congress has done by the Amateur Sports Act by, as she put it, taking a "generic" term that's several thousand years old and giving right to use a private organization such as the United States Olympic Committee. But whether that's valid or not was determined by the Ninth Circuit when they determined that the Amateur Sports Act is constitutional.

So there isn't any infringement upon "generic" use here.

And finally, counsel has conceded that the reservation of use of the term "Olympic" and Olympic symbols to the U.S.O.C. is vital to their purpsoes and vital to carrying out those purposes.

The United States Olympic Games are the games that are supported by private sources of financing rather than by governmental sources of financing. And the use therefore of these terms in commercial applications, licensing as the U.S.O.C. does to raise funds to support American athletes in the Olympic Games is vital and it's for that reason that Congress carved out this hybrid statute, as your Honor pointed out, combining the remedies of the Lanham Trademark Act with a specifically defined liability in the Amateur Sports Act.

Mr. Walker Dunlap: *(cont.)*: We believe that the facts are without dispute and the legal issues have been determined and are binding on this Court. Thank you.

The Court: Thank you. I think I'll take the matter and submit it.

Ms. Dunlap: May I offer only one observation, your Honor, and that is if the real Olympics that Mr. Walker says are opened to all participants, I intend to —

The Court: I don't think that's relevant to the argument. Thank you. The matter is submitted.

I refer to Section 380 of the Amateur Sports Act of 1978.

Falling on that reference it appeared that defendants first argue that the tending to cause confusion standard must be read in the overall prohibition on the use of the term "Olympic" to promote any athletic performance or competition and that this is a question of fact which cannot be determined on a motion for summary judgment.

Secondly, they argue that even if this standard is not read in the use of the term "Gay Games" in connection with "Olympic," is a combination under a subsection of Section 380 in invoking the allegedly factual "tending to cause confusion" standard.

Regarding first contention that "tending to cause confusion" standard should not be applied to the basic promotion of athletic contests, the dramatical construction and plain meaning of the statute indicates that this alone is sufficient violation to impose liability.

The reference already made to the opinion of the Ninth Circuit any other interpretration will be deemed "inawkward construction."

Defendants' other claim is also without merit to infer that Gay Olympic Games is a combination requiring the U.S.O.C. to prove "tendency to cause confusion" distorts the Congressional intent that an authorized use of the term "Olympic" does not require proof of such tendency otherwise obviously the U.S.O.C. would be compelled to present, I

The Court: *(cont.):* would say, such proof whenever an infringer uses the word "Olympic" by any other word.

Defendants contended that their use of the "Olympic" constitutes a quote "fair use" unquote defense under the Trademark Act. This Court's reading of Section 380 indicates that 380 incorporates only the remedies of the Trademark Act and nothing in the language or the legislative history of Section 380 indicates that the Trademark Act's defenses were to be incorporated as well.

Defendants have claimed that the U.S.O.C. is a governmental actor subject to certain constitutional scrutiny. The only case to have dealt with this question expressly found that that doctrine did not file.

Defendants also have contended as a defense the alleged violation of their first amendment rights and 14th amendment rights. These arguments can be disposed of on the grounds that quote "no state action" unquote is present because the U.S.O.C. is not a governmental actor.

The defendants have contended that the proposed injunction permanently prohibiting them from using the term "Olympic" is too broad.

They also contend that they should be allowed to use that word with a suitable disclaimer. I think it's the opinion of this Court that this argument would undermine the purpose of the Amateur Sports Act of 1978 and, in effect, with countenance allowing any infringer, however objectionable, to use "Olympic," so long as it expressly disallowed any connection with the U.S.O.C.

It appears to this Court that there are no triable issues of fact. Summary judgment shall be granted in favor of the plaintiffs and a preliminary injunction is hereby made permanent.

Thank you very much.

Mr. Walker: Thank you, your Honor.

Shall we prepare a judgment, your Honor?

The Court: Yes. You prepare the judgment.

Mr. Walker: Thank you.
The Court: Thank you. The Court is in recess.

(Reporter's certificate omitted.)

File Date: Febuary 16, 1984

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

INTERNATIONAL OLYMPIC COMMITTEE, a corporation organized and existing under the laws of Switzerland; UNITED STATES OLYMPIC COMMITTEE, a corporation organized and existing under the laws of the United States of America,

Plaintiffs,

vs.

SAN FRANCISCO ARTS & ATHLETICS, a California corporation; THOMAS F. WADDELL,

Defendants.

No. C-82-4183 J.P.V.
Order Granting Plaintiffs' Motion for Summary Judgment on the Complaint and Counterclaim

Plaintiffs' motion for summary judgment on the complaint and counterclaim came on for hearing on February 2, 1984. Counsel were heard and the contentions of the parties and the record herein were fully considered. After deliberation, the Court has determined that there is no genuine issue as to any material fact with respect to either the complaint or the counterclaims herein and that plaintiffs are entitled to judgment as a matter of law on both the complaint and

defendants' counterclaims.

N o w, T h e r e f o r e, it is *ORDERED* that plaintiffs' motion for summary judgment is granted and that judgment be entered herein in plaintiffs' favor and against defendants on the complaint and the counterclaims with costs and disbursements to be taxed by the clerk in favor of plaintiffs and against defendants.

Dated: February 16, 1984

J.P. VUKASIN (Signed)
United States District Judge

File Date: Febuary 17, 1984

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Judgment

The judgment is reprinted as Appendix 6, pages 77-80, of the Petition for Certiorari.

File Date: Febuary 28, 1984

(Names omitted. See J.A. 1, above.)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Notice of Entry of Judgment

To defendants San Franciso Arts & Athletics, a California corporation, and Thomas F. Waddell and their attorneys of record:

PLEASE TAKE NOTICE that judgment (a copy of which is attached hereto) was entered in the above-entitled action on February 17, 1984.

Dated: February 27, 1984.

PILLSBURY, MADISON & SUTRO
VAUGHN R. WALKER
ROBERT A. GORDON

BEVERIDGE, DeGRANDI & KLINE
RICHARD G. KLINE
EDWARD T. COLBERT

PISAR & HUHS
JOHN I. HUHS

By VAUGHN R. WALKER (Signed)
Attorneys for Plaintiffs
International Olympic Committee and
United States Olympic Committe

File Date: March 16, 1984

(Names & caption omitted, See J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Notice of Appeal
(F.R.A.P. Rules 3(a) and 4(a)(1))

NOTICE IS HEREBY GIVEN that defendants and cross-plaintiffs appeal from the Judgment entered in the above-captioned action and counterclaim on February 17, 1984, to the United States Court of Appeals for the Ninth Circuit. This notice is filed pursuant to Rules 3(a) and 4(a) (1) of the

Federal Rules of Appellate Procedure.

Dated: 16 February 1984

Mary C. Dunlap (Signed)
Attorney for Defendants and
Cross-plaintiffs

File Date: April 16, 1984

(Names & caption omitted, See J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Notice of Motion and Motion for an Award of Attorney's Fees
(36 U.S.C. § 380, 15 U.S.C. § 1117)

To defendants above-named and to their attorneys of record:

PLEASE TAKE NOTICE that on May 17, 1984, at 10 A.M. or as soon thereafter as the matter may be heard before the Honorable John P. Vukasin in Courtroom 10 of the above-entitled court, plaintiffs above named will move the Court for an award of attorneys' fees. This motion is made pursuant to the Amateur Sports Act of 1978 (36 U.S.C. § 380) and on the grounds that:

1. An award of attorneys' fees for actions under the Amateur Sports Act of 1978 is authorized and appropriate;

2. This is an exceptional case because defendants have willfully violated the Act;

3. An award of attorneys' fees would serve the public interest because it would allow funds otherwise diverted to pay lawyers to be devoted instead to assisting American

athletes to participate in the Olympic games; and

4. An award of attorneys' fees would discourage willful violations of the Amateur Sports Act by nonprofit groups such as defendants who otherwise lack a disincentive to avoid infringement of Olympic designations.

This motion will be based upon the memorandum of points and authorities filed herewith, the declarations filed herewith and the files, records and papers herein.

Dated: April 16, 1984

(Names omitted.)

By: Robert A. Gordon (Signed)
Attorneys for Plaintiffs
International Olympic Committee and
United States Olympic Committee

(Certificate of Service omitted.)

File Date: April 16, 1984

(Names & caption omitted, See J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Memorandum in Support of Plaintiffs' Motion for an Award of Attorneys' Fees

(Indexes omitted.)

This memorandum is submitted in support of plaintiffs' motion for an award of attorneys' fees pursuant to the Amateur Sports Act of 1978 (P.L. 95-606, 92 Stat. 3045,

3048-3049; 36 U.S.C. § 380.)

PRELIMINARY STATEMENT

Plaintiffs seek an award of reasonable attorneys' fees in connection with this Court's judgment entered on February 17, 1984. The Amateur Sports Act, by incorporating the remedies of the Lanham Trademark Act of 1946 (60 Stat. 427; 15 U.S.C. § 1051, et seq.), provides for the recovery of attorneys' fees. Attorneys' fees should be awarded in this case because:

1. Defendants, knowing of the Sports Act's prohibition against use of Olympic designations, willfully violated the Act, forcing plaintiffs to bring this action to protect their rights.

2. USOC raises its funding through private donations and a corporate participation program whereby use of Olympic designations and symbols is authorized or licensed in return for financial support. By necessitating this action, defendants have required plaintiffs to divert funds that would otherwise have been available to support United States participation in the Olympic games and instead pay attorneys' fees. USOC's activities are devoted to supporting the development of amateur sports in this country and the participation by United States athletes in the Olympic Games.

3. An attorneys' fees award would further foster the Sports Act's purpose of protecting Olympic designations by discouraging willful violations, especially by nonprofit gadflies such as defendants which—however sincerely motivated—have no other economic disincentive to avoid interference with Olympic designations.

From August 1982, when retained, to date, USOC's principal attorneys in this matter have spent 475 hours in research, preparation of pleadings and motions, successful defense of defendants' appeal of the preliminary injunction and prosecuting the action through to judgment. The general attorneys of the USOC in Washington, D.C., have also spent in excess of 400 hours on this matter. A reasonable attorneys'

fee for this work would be at least $100 per hour.[1]

I. DEFENDANTS' KNOWING INFRINGEMENT OF PROTECTED OLYMPIC DESIGNATIONS JUSTIFIES AN AWARD OF ATTORNEYS' FEES AGAINST DEFENDANTS.

A. The Amateur Sports Act allows for recovery of attorneys' fees.

The Amateur Sports Act protects the distinctiveness, value and marketability of the various terms and symbols associated with the Olympic games. The Act gives USOC exclusive right to use Olympic designations (36 U.S.C. § 380(c)) Congress endorsed and authorized USOC's corporate participation program (36 U.S.C. § 380(b)). Through that program, USOC, during the 1980-1984 quadrennium, will raise approximately $40 million (Miller Aff., filed Aug. 9, 1982, p. 1). These funds are devoted to organizing, financing and controlling United States participation in the International Olympic Games and the Pan American Games (ibid.). As the means of affording this protection, the Sports Act gives to the USOC the exclusive right in the United States to these Olympic designations.

The Sports Act expressly affords USOC the same remedies provided for in the Lanham Trademark Act to protect Olympic designations against unauthorized use (36 U.S.C. § 380 (a)). Those remedies include:

(a) injunctive relief (15 U.S.C. § 1116);

(b) damages (15 U.S.C. § 1117);

(c) accounting for profits (15 U.S.C. § 1117);

(d) award of attorneys' fees (15 U.S.C. § 1117); and

(e) destruction of infringing materials (15 U.S.C. § 1118).

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[1]The general attorneys of the IOC have also spent time on this case. Because Mr. Huhs has been out of the country, a declaration for his time spent has not yet been filed. It will be filed and served at the earliest opportunity. Mr. Huhs has spent 89 hours on this matter.

The Sports Act does not expressly set forth the standards which must be met in order to obtain the various forms of relief, but the legislative history indicates that attorneys' fees may be awarded in any case in the discretion of the court. The legislative history of the Sports Act reveals that the reference in § 380 to the Lanham Trademark Act was intended as a shorthand way of listing the kinds of relief available to the USOC for violations of the new cause of action created by the Sports Act. The version of the Sports Act that originally passed the Senate contained a section which was, in effect, essentially the same as the present § 380 (S.2727, 95th Cong., 2d Sess., 1978 Cong.Rec. S.7083, S.7102).

The Senate version contained two subsections which do not appear in § 380. The first was an express grant of jurisdiction to the district courts to hear § 380 cases. The second was a list of the remedies available for violations of the section, which included the standards to be applied in awarding the remedies. Subsection (a) of the Senate version stated that those who violate § 380 "shall be liable in a civil action by the [USOC] for the remedies provided in subsection (c) of this Section."

In the bill as enacted, the length of § 380 was reduced by eliminating the special jurisdiction and remedies provisions, and by relying instead on general Federal question jurisdiction and the relief incorporated by reference from the Trademark Act.

The reference to "the Trademark Act" was substituted for the reference to subsection (c) to conform to the House version. Nothing in the legislative history indicates that this change was meant to substantively affect the provision (1978 Cong.Rec. S.19040). Because § 380 does not set forth the standards for relief, the Senate version of subsection (c) may be examined to see what standards were intended to apply for relief under the Amateur Sports Act. That subsection provided:

"(c) When a violation of any provision of this section

is established in any civil action arising under this section, the [USOC] shall be entitled to—

"(1) obtain injunctive relief upon such terms as the court considers reasonable to prevent a violation or threatened violation of this section;

"(2) recover the profits which the defendant accrued as a result of such violation;

"(3) recover any damages sustained by the Corporation; and

"(4) recover costs of the action, including, at the discretion of the court, the amount of reasonable attorney's fees" (1978 Cong.Rec. S.7102).

The question of whether attorneys' fees should be awarded in a given case was left to the "discretion of the court." This standard is far less restrictive than the "exceptional case" standard of the Lahnam Act.[2] In view of the knowing and willful character of the defendants' violation, attorneys' fees are recoverable under either test.

In *U.S. Olympic Committee* v. *Union Sport Apparel* (E.D.Va. 1983) 220 U.S.P.Q. 526, 531 (a copy of the opinion is attached as Exhibit A) the court applied the Lanham Act provision to award attorneys' fees under the Amateur Sports Act. The court there found that defendants' violation was a willful infringement of USOC's rights and that USOC had been forced to go to considerable expense to protect its statutory rights despite the failure of defendants to present a credible defense. These same criteria apply and compel an award of fees here.

B. Defendants' conduct represents a willful violation of the Amateur Sports Act.

The facts leading up to this lawsuit are summarized in the

---

[2]This is similar to the lesser burden required by the cause of action itself. The Court has held that:

"By its choice of 'tending' rather than 'likely', Congress must have meant to place less of a burden on a plaintiff under a Section 380 cause of action than that placed upon a plaintiff suing under the Trademark Act alone" (Ord., August 20, 1982, p. 11)

Court's Order filed August 20, 1982, setting out findings in support of the preliminary injunction. In the Order, Judge Peckham noted that when defendant San Francisco Arts & Athletics ("SFAA") was incorporated, its organizers attempted to incorporate under the name "Golden Gate Olympic Association" (Order, Aug. 20, 1982, p. 2). In the words of defendant Waddell:

> "We were told at the time the word 'Olympic' could not be used in a corporate title. We subsequently filed for incorporation on August 4, 1981, as San Francisco Arts & Athletics" (Waddell Decl., filed Aug. 16, 1982, pp. 4-5).

Defendants claim, despite this warning, to have been under the impression that they could use Olympic designations to describe the events they intended to sponsor (id., p. 5). Waddell offers no explanation for this impression but admits going forward with unauthorized use:

> "We began using the words 'Gay Olympic Games' on our letterheads and mailings and in the local gay press as early as September of 1981" (Waddell Decl., Aug. 16, 1982, p. 5).

Waddell admits a warning came from another source:

> "In mid-December 1981, I received a call from someone at the Women's Sports Foundation, who told me that *we may be in trouble*. She related that someone from the USOC had been in her office and noticed our newsletter and told her to call us" (Waddell Decl., p. 5).

On December 26, 1981, Dr. Waddell mailed a letter to F. Don Miller, Executive Director of USOC, asking for permission to use Olympic designations (Waddell Decl., Exh. A). In the meantime, USOC had learned of defendants' use of Olympic designations and on December 23, Colonel Miller wrote the Gay Olympics that such use of Olympic designations violated the Amateur Sports Act and requested cessation of that use (Waddell Decl., pp. 5-6, Exh. B; Miller Decl., Exh. A).

On January 15, 1982, Dr. Waddell and Colonel Miller

talked by telephone; Miller reiterated USOC's position and his demand that defendants cease use of Olympic designations (Waddell Decl., p. 6), a "position which I readily understood" (ibid.). Dr. Waddell stated under oath:

> "On January 18, 1982 I wrote Mr. Miller (Exhibit C) responding to his request because our committee felt threatened and uncertain of our rights. We decided as an interim measure and in a spirit of legal compromise to drop 'Olympic' while we sought legal counsel" (Waddell Decl., p. 6).

The Court found that defendants by this letter had "agreed to cease permanently the use of 'Olympic'" (Ord., Aug. 20,1982, p. 4).

Waddell's letter was short and friendly, concluding with "Best wishes for a successful campaign for the 1984 Olympic Games in Los Angeles" (Waddell Decl., Exh. C). But after obtaining advice of counsel, Waddell wrote a very different letter eight days later (Waddell Decl., p. 6). In this letter, Waddell wrote Miller that USOC's request was discriminatory and on dubious legal footing (Waddell Decl., Exh. D). Later in these proceedings, defendants claimed that Waddell's January 26, 1982 letter revoked their apparent agreement to cease use of Olympic designations, a contention Judge Peckham disbelieved (Ord., Aug. 20, 1982, p. 4).

In the meantime, however, USOC's counsel, Richard G. Kline, on February 2, 1982 wrote Waddell that USOC was disturbed by Waddell's "apparent repudiation" of the prior agreement to discontinue use of Olympic designations. Kline told Waddell that USOC had declined to bring legal action to enforce its rights under the Amateur Sports Act in return for defendants' discontinuance of Olympic designations (Kline Decl., Exh. B). Defendants' counsel, Mary Dunlap, offered a "proposed accommodation" whereby defendants would use Olympic designations with a disclaimer of any association with USOC (Kline Decl., Exh. C). USOC's counsel replied with a letter dated February 22 rejecting this suggestion and reminding Ms. Dunlap that her client had

already agreed to discontinue use of "Olympic" to describe the event which they proposed to conduct (Kline Decl., Exh. D). The letter concluded:

> "The United States Olympic Committee considers that the issue of the use by your client of the term 'Olympic' in connection with its proposed athletics games has been amicably resolved. Your offer to modify the pre-existing agreement to include a disclaimer is unacceptable" (ibid.).

Nothing further was heard from defendants or Ms. Dunlap (Kline Decl., p. 2).

With respect to whether or not there was an agreement by defendants to discontinue use of Olympic designations, Judge Peckham decided that issue for USOC:

> "Waddell now claims that the [January 18, 1982] letter was meant only to indicate that SFAA would cease use of the term 'olympic' as an interim compromise, pending negotiations over use of the word. We believe, to the contrary, that the letter agreed to cease permanently the use of 'Olympic' and that the 'interim measure' mentioned in the letter referred to the fact that defendants would block out 'olympic' from their old stationery and posters until such time as new printed materials could be obtained" (Order, Aug. 20, 1982, p. 4).

Although the issue of willfulness was not an element which Judge Peckham needed to determine for issuance of a preliminary injunction, he determined that it was "likely" that both defendants and USOC believed that they had "forced its wishes upon the other party" (Order, Aug. 20, 1982, p. 5). Nonetheless, evidence of defendants' willful violation of the Amateur Sports Act is apparent in the present record. In a press release revised as of July 7, 1982, defendants stated:

> "In January, 1982, the U.S. Olympic Committee based in Colorado Springs challenged the Gay Olympic Games under threat of a lawsuit to stop using the words Olympic and Olympiad. The Gay Olympic Games

organizers expect their rights to use the words are legally justified, and, therefore, continue using the name, Gay Olympic Games" (Walker Decl., Aug. 16, 1982, Exh. B).

Defendants reportedly regarded the silence ensuing after Mr. Kline's February 22 letter as a mixed blessing; defendants, apparently, were looking for trouble. A columnist for the San Francisco Chronicle wrote:

> "Nothing more has been heard [from USOC], or is expected. For the Gay Olympics people, it's good news and bad news. They're happy to overcome an objection to their show; they're sad because they're not getting any national press" (Preston Decl., Exh. A).

Finally, defendants vigorously argued to this Court that at no time was their use of Olympic designations anything other than intentional. For example, as to Dr. Waddell's January 18, 1982 letter, defendants argued:

> "Dr. Waddell's letter to Colonel Miller of January 18, 1982, which was written to offer such a temporary grace period while defendants' found out about their legal rights and duties and tried to resolve this matter, was followed *eight (8) days afterward*, on January 26, 1982, with a letter by Dr. Waddell to Colonel Mill [sic] and USOC asserting defendants' rights and interests in continuing to use 'Olympic,' and by a letter from defendants' attorney on February 12, 1982, which declared and informed plaintiffs' attorney Mr. Kline in relevant part:
>
> > 'My client and its representatives, officers and other concerned do not intend to abandon their rights to use the term "Olympic"',
>
> "and which letter from defendants' attorney went on to refer to defendants' then-existing materials containing the word 'olympic', offering to asterisk these materials and to label them 'not associated with the U.S. Olympic Committee', *solely* as an accommodation to plaintiffs. *** Defendants plainly informed USOC of their use and intention to continue to use 'Olympic' (with or without

> the asterisk) as of defendants' attorney's letter to Mr. Kline of February 12, 1982, and defendants' use of 'Olympic' has been open from that time until the T.R.O. was issued on August 9, 1982" (Defendants' Mem.Opp.Pls'Mot.for Preliminary Injunction, Aug. 16, 1982, pp. 24-25).

Even more striking evidence of defendants' willful misconduct has recently come to plaintiffs' attention. In a new publication of defendant San Francisco Arts & Athletics (Walker Decl., filed herewith, Exh. A), which is edited by defendant Dr. Waddell, defendants promote a "1986 Lesbian/Gay Winter Olympic Games" in direct violation of this Court's preliminary injunction. (The permanent injunction was not entered until February 1984.) That publication also discloses (for the first time) that at defendants' 1982 event, the torch bearers who opened the Gay Games wore official Olympic uniforms displaying the Olympic symbol of five interlocking rings. This also violated this Court's preliminary injunction which prohibited:

> "[D]efendants *** their attorneys and representatives, from use of *** any symbol, emblem, trademark or ensignia of the International Olympic Committee or the U.S. Olympic Committee."

To add to the contemptuous nature of this act, one torch bearer was one of the attorneys representing defendants in this Court, who clearly was well aware of the Court's injunction, and as an officer of the Court, should be held to a strict standard of compliance.

II. AN AWARD OF ATTORNEYS' FEES WOULD FOSTER UNITED STATES PARTICIPATION IN THE OLYMPIC GAMES, THE PURPOSE OF THE AMATEUR SPORTS ACT.

As noted by the court in the *Union Sport Apparel* case, unauthorized use of Olympic designations frustrates the purpose of the Amateur Sports Act (*U.S. Olympic Committee v. Union Sport Apparel* (E.D.Va. 1983) 220 U.S.P.Q. 526, 529). Because USOC's funding derives from private contribu-

tions and its corporate participation program, an award of attorneys' fees here is particularly appropriate:

> "Requiring use of the Olympic Committee's funds to enforce the statute against those who would violate 36 U.S.C. § 380, diminishes the amount of funding available to implement the Olympic Committee's athletic programs. The public interest would best be served by having the costs necessary for enforcement of the Olympic Symbol Protection statute be borne by those who violate that statute, rather than by the public's contributions. Particularly where, as here, those expenses were caused by a recalcitrant defendant without a substantial defense. Thus, in order to allow the Olympic Committee to enforce the statute as contemplated by Congress, while at the same time maintaining its development programs, attorneys' fees should be granted liberally under the statute. Such an award of attorneys' fees is particularly appropriate where, as here, the violation has been willful and with disregard for the Olympic Committee's preemptive rights" id. at p. 529).

The infringer in *Union Apparel* was acting for profit, whereas here defendants' organization is a nonprofit one, seeking to advance what they regard as an important cause. But this difference in motivation does not suggest that defendants here should be given any special consideration in spite of their wrongful conduct. Relieving defendants of liability for USOC's attorneys' fees because they are a nonprofit organization when a profit-making group would have otherwise been held liable would simply encourage nonprofit-making groups to trade on Olympic designations for their purposes. Nonprofit-making groups should not be permitted to violate the Act with impunity.

Throughout this litigation, defendants have repeatedly referred to the existence of other nonprofit groups which they claim have infringed Olympic designations. Dr. Waddell's declaration, for example, referred to "Alcoholics

Olympics," "Armenian Olympics," "Police Olympics," "Olympics of Ballet," "Olympics of the Mind," "Crab Cooking Olympics," among others (Waddell Decl., p. 2). Although some of these allegedly infringing uses are not as serious as defendants' infringement, the problem of nonprofit-making, special interest groups or charitable gadflies misusing Olympic designations is a serious one, as defendants themselves recognize. Monitoring the activities of such groups requires substantial attention and resources of USOC (Ronald T. Rowan Decl., Aug. 16, 1982, pp.2-3). Not all nonprofit groups misusing Olympic designations are irresponsible or frivolous; some of these groups have included the March of Dimes, Birth Defects Foundation and the Muscular Dystrophy Association (Kline Decl., Sept. 16, 1983, p. 2, Exhs. N, O). An award of attorneys' fees would discourage unauthorized use of Olympic designations and plainly strengthen USOC's hand in dealing with misusers and infringers (see *Playboy Enterprises* v *Baccarat Clothing Co., Inc.* (9 Cir. 1982) 692 F.2d 1272 (holding that monetary awards against infringers are essential to deter the prohibited conduct)). This plainly would advance the statutory purpose of the Amateur Sports Act and it matters not that the infringers are serving what they regard as a worthwhile cause as opposed to simply lining their own pockets. As for the effect on the plaintiffs, it amounts to the same thing.

III. CONCLUSION

For the foregoing reasons, plaintiffs submit that this Court should award them their attorneys' fees as set forth in the declarations filed herewith.

Dated: April 16, 1984.

(Names omitted. See J.A. 5, above.)

By Robert A. Gordon (Signed)
Attorneys for Plaintiffs
International Olympic Committee and
United States Olympic Committee

(Copy of opinion in *USOC v. Union Sport Apparel,* 220 U.S.P.Q. 526 (E.D.Va. 1983) omitted in printing. Opinion is in Record, Docket #96.)

File Date: April 16, 1984

(Names & caption omitted in printing, see J.A. 5, above.)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Robert A. Gordon in Support of Plaintiffs' Motion for an Award of Attorneys' Fees

ROBERT A. GORDON declares as follows:

1. I am a member of Pillsbury, Madison & Sutro, principal attorneys for plaintiffs in this action. I have personal knowledge of the matters hereinafter set forth, and if called as a witness could testify competently thereto.

2. Plaintiffs retained Pillsbury, Madison & Sutro to prosecute this action in August 1982. Since that time, attorneys of Pillsbury, Madison & Sutro have worked on this action for a total of 480 hours. Pillsbury, Madison & Sutro has actually billed plaintiffs for 480 hours of work on this case.

3. A reasonable hourly rate for the work performed on this case by plaintiffs' principal attorneys is $100 per hour. Accordingly, a reasonable attorneys' fee to be awarded plaintiffs in this action, for work performed by this law firm, is $48,000.

4. Attached hereto as Exhibit A is a true copy of a publication entitled "Triumph in 86," published and edited by defendants herein.

(Jurat omitted.)

(Exhibits omitted in printing.
Exhibits are in Record, Docket #97.)

File Date: April 16, 1984

(Names & caption omitted in printing, see J.A. 5, above.)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Joseph D. Lewis in Support of Plaintiffs' Motion for an Award of Attorneys' Fees

JOSEPH D. LEWIS declares as follows:

1. I am a member of Beveridge, DeGrandi & Kline, attorneys for plaintiffs in this action. I have personal knowledge of the matters hereinafter set forth, and if called as a witness could testify competently thereto.

2. Beveridge, DeGrandi & Kline acts as general counsel to plaintiff United States Olympic Committee. Since this litigation began in August 1982 attorneys of Beveridge, DeGrandi & Kline have worked on this aciton in excess of 400 hours. Beveridge, DeGrandi & Kline has actually billed plaintiffs for over 400 hours or work on this case.

3. A reasonable hourly rate for the work performed on this case by plaintiffs' attorneys is $100 per hour. Accordingly, a reasonable attorneys' fee to be awarded to plaintiffs in this action for the work done by Beveridge, DeGrandi & kline is $40,000.

(Jurat omitted.)

File Date: April 18, 1984

(Names & caption omitted in printing, see J.A. 5, above.)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Corrigendum to Memorandum in Support of Plaintiffs' Motion for an Award of Attorneys' Fees

The following correction should be made to the Memorandum in Support of Plaintiffs' Motion for an Award of Attorneys' Fees, filed April 16, 1984:

Page 12, line 24: "Walker Decl." should be changed to "Gordon Decl."

Dated: April 18, 1984

By Robert A. Gordon (Signed)
Attorneys for Plaintiffs
International Olympic
Committee and United States
Olympic Committee

(Names & addresses omitted, see J.A. 5 above.)

File Date: April 24, 1984

(Names & caption omitted in printing, see J.A. 5, above.)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of John I. Huhs in Support of Plaintiffs' Motion for an Award of Attorneys' Fees

JOHN I. HUHS declares as follows:

1. I am a member of Pisar & Huhs, attorneys for plaintiff International Olympic Committee in this action. I have personal knowledge of the matters hereinafter set forth, and if called as a witness could testify competently thereto.

2. Our firm was instructed by the International Olympic Committee to prosecute this action in August 1982. Since that time, attorneys of Pisar & Huhs have worked on this action for a total of 89 hours. Pisar & Huhs has actually billed plaintiff International Olympic Committee for 89 hours of work on this case.

3. A resonable hourly rate for work performed on this case by plaintiff International Olympic Committee's attorneys is $100 per hour. Accordingly, a reasonable atorneys' fee to be awarded to plaintiff IOC in this action is $8,900.

(Jurat omitted.)

(Certificate of service omitted.)

File Date: May 10, 1984

(Names & caption omitted in printing, see J.A. 62, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Defendants' Memorandum of Points and Authorities in Opposition to Motion for Award of Attorneys' Fees

* * *

(Indexes omitted.)

I. THE LAW, THE FACTS AND EQUITABLE CONSIDERATIONS PRECLUDE ANY AWARD OF ATTORNEYS' FEES TO PLAINTIFFS IN THE CASE AT BAR.

A. The Test Is Not What Plaintiffs Assert

By a totally twisted, illogical and unsound "version" of the legislative history and meaning of the section 380 of the Amateur Sports Act, USOC[1] argues in effect that this Court is free to order defendants to pay USOC its attorneys' fees, without regard to the test for such awards that is set forth in the Lanham Act, 15 U.S. Code section 1117. (Pl. Memo. Supp. Mo. Atty Fees 3-6). Section 380 of the Amateur Sports Act *specifically* refers to the Lanham Act in identifying the remedies made available to USOC for trademark infringement. The test urged in its motion by USOC, to wit., that attorneys' fees may be awarded "at the discretion of the court", was not adopted by Congress in enactment of the Amateur Sports Act. The language of the Senate version of section 380 relevant to attorneys' fees was not adopted by Congress, and that rejected language was "at the discretion of

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[1]USOC is the only plaintiff referred to in this memorandum because USOC alone, and not IOC, has standing to sue under the Amateur Sports Act. *Flast v. Cohen*, 392 U.S. 83 (1968); *Sierra Club v. Morton*, 405 U.S. 727 (1972)

the court". The version that Congress did adopt *expressly* refers to "...the remedies provided in...the Trademark Act...", 36 U.S. Code section 380(a). It is obvious that if Congress had chosen to empower courts in section 380 cases to grant attorneys' fees to USOC at "the discretion" of such courts, and without regard to the formulation of this statutory remedy under the Lanham Act, Congress had the vehicle before it to accomplish that purpose, in the form of the Senate version on this point that was not adopted. Thus USOC's effort to write itself a blank check for attorneys' fees under 36 U.S. Code section 380 fails, in that Congress elected not to do so, and elected instead to have courts hearing section 380 cases be guided by "the remedies provided in...the Trademark Act of 1946".

According to USOC's proffered reasoning on this issue, a court interpreting a federal law is free to adopt rejected language from one version of a proposed law instead of applying and interpreting the language that Congress actually chose to adopt. That is simply not how judicial construction of statutes works. A court construing a statute is not empowered to discard the statute's words in favor of other, different language that the legislative branch rejected. To hold otherwise would invite judicial superlegislation and chaos in court.

USOC's position on this point also does not make any independent sense. If its position were accepted by this Court, then this Court and all others would be free to grant or deny remedies to USOC under 36 U.S. Code section 380 without any accountability to the formulae for such remedies developed under the Lanham Act. If that had been Congress' intent, then surely Congress would not have explicitly pointed to "the remedies provided in...The Trademark Act" in defining the remedies available to USOC under section 380 of the Amateur Sports Act.

Moreover, in the only reported case on this issue, *USOC v. Union Sport Apparel*, 220 U.S.P.Q. 526, 531 (E.D.Va. 1983), the District Court awarded attorneys' fees "[i]n view of the

willful infringement by defendants" and in their "failure to put forward a *credible defense*", concluding in pertinent part that "this is an exceptional case within the meaning of 15 U.S.C. sec. 1117 *as incorporated by the Amateur Sports Act of 1978...*". (emphasis added) Thus, USOC's unfounded version of the legislative history and meaning of section 380 as it pertains to attorneys' fees awards has been rejected by the only court to decide the question to date. In summary, there is no authority for the position of USOC that this Court may disregard the incorporation of the legal standards and tests for availability of attorneys' fees in trademark infringement cases into the remedies provisions of section 380, and the plaintiffs' motion for fees thus must be measured against the standards developed under 15 U.S. Code section 1117.

B. Defendants Did Not Maliciously, Fraudulently, Deliberately, Nor Willfully Infringe Plaintiffs' Trademark, And This Is Not An Exceptional Case Under 15 U.S. Code Section 1117.

No court at any stage of the instant litigation has found defendants to have engaged in malicious, fraudulen deliberate nor willful infringement of USOC's trademarks, or any of them. In issuing the preliminary injunction in this action, the District Court per Judge Peckham specifically did *not* find that defendants' use of "Olympic" would tend to "deceive", 36 U.S. Code section 380 (Order p.11 (8/20/82), nor did the District Court on that occasion find any deliberateness, willfulness nor malice in defendants' purpose in using "Olympic". Instead Judge Peckham specifically found that, in this case until the litigation was commenced, "...it [is] likely that each party was under the impression that it had forced its wishes upon the other party and that each had achieved its respective goals." (Order p.5 (8/20/82))

The record in this action is replete with evidence of the non-malicious, non-fraudulent, non-deliberate and non-willful nature of defendants' asserted trademark infringement

upon the word "Olympic"[2]. The purpose of using "Olympic" was not to create confusion, deception, mistake or false suggestion of a relationship between SFA&A and its activities and USOC and the Olympic Games, nor was the purpose to trade on USOC's goodwill. (See Dec. T. Waddell, pp.2-4; M. Brown, p.2; P. Mart, p.2; E. Petersen p.2, filed in opposition to the motion by USOC for a preliminary injunction in this action (8/16/82)). Indeed, defendants' literature specifically disavowed the alleged current emphasis of "the traditional Olympics" on competitiveness (Exhibit I to Dec.T. Waddell Opp.Mo.Prelim.Inj.), and expressly distinguished SFA&A's position as to fundraising from that of USOC (Exhibit H to Dec.T. Waddell Opp. Mo.Prelim.Inj.) Defendants in this action even offered to place an express disclaimer of any affiliation with USOC or the Olympic Games on all defendants' paraphernalia; this offer was rejected by plaintiffs' attorneys. (Exhibit D to Dec.T. Waddell Opp.Mo.Prelim.Inj.) It is patently obvious upon this record that defendants at bar neither intended nor acted maliciously, fraudulently, deliberately nor willfully to infringe USOC's trademark on the term "Olympic". Oppositely, as the record cited above shows plainly, defendants neither intended nor sought to create any appearance of a connection with USOC or the Olympic Games, and defendants expressly and openly differentiated themselves and their activities from those of USOC, as specified above. Defendants' open differentiation of their activities from those of USOC, and their open criticism of USOC and the Olympic Games, puts these defendants in a very different posture in fact and in law than that of the "willful infringer" of a trademark. Willful infringers "offer...no credible explanation why they adopted a name so similar to [the trademark

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[2]Defendants use the term "asserted" here in modifying the terms "trademark infringement" for the reason that defendants do not believe that findings of infringement were warranted upon the motion for summary judgment, the resulting judgment from which is now subject to appeal.

holder's]...other than to trade on [the holder's] widespread popularity." *Playboy Enterprises Inc. v. Chuckleberry Publishing Inc.*, 687 F.2d 563, 565 (2nd Cir. 1982). Here, oppositely, defendants have avowed without a scintilla of factual impeachment or rebuttal that they used the term "Olympic" for philosophical, symbolic and non-commercial purposes, and held no intent to trade on the "widespread popularity" of USOC and the Olympic Games in choosing the word for those distinct purposes.

The contrast between defendants' intent and action at bar, and the intents and actions of those who have been held liable for attorneys' fees for willful, deliberate, malicious or fraudulent trademark infringement, is vivid and poignant, this contrast should decide the instant motion against plaintiffs.

In *USOC v. Union Sport Apparel,* cited *supra*, defendant was advised by its attorneys in 1979 that it had "some exposure to claims" by USOC, and defendant nonetheless continued to market its products with the offending letters "U.S.A." and the 3-ring logo, in spite of advice from counsel, and from its purchaser Federated Department Stores, that it was acting in contravention of USOC's rights; defendant made $1.8 million in profits from this course of action. 220 U.S.P.Q. at 527-8. By contrast, defendants at bar were advised by attorney Dunlap that she believed that USOC's position was constitutionally flawed, and defendant Dr. Waddell was advised by a representative of the Northern California ACLU not to sue USOC, and that ACLU would defend Dr. Waddell et al. if USOC sued them. (Dec. T. Waddell Opp.Mo.Prelim.Inj. pp.6-7) As Judge Peckham indicated he likely would find, defendants and plaintiffs at bar *alike* believed that they had prevailed upon each other as to their viewpoints on the use of "Olympic" by defendants, as of the time period before filing of suit in this case. (Order p.5; Dec. T. Waddell p.7 lines 19-24) Putting aside the commercial profit-making purposes of defendants in the *Union Sport Apparel* case, and putting aside the absence of any constitu-

tional or statutory defense or counterclaims in that case, both of which factors distinguish the case at bar, the state of mind of defendants in the instant case was and is not comparable to that of a willful trademark infringer such as defendant in *Union Sport Apparel*—here, unlike that case, defendants had a different purpose in using "Olympic" than a trademark infringer, and defendants had a distinct basis in legal advice to believe that their position was not that of a trademark infringer.

USOC also argues that this Court should cast aside consideration of the non-profit and non-commercial nature of defendants' activities in deciding its motion for attorneys' fees. This cannot properly be done by the Court, if it is to follow relevant law. Malicious, fraudulent, deliberate and willful trademark infringers share a fundamental common purpose—to *profit* economically by the misuse of others' trademarks. It is precisely that impermissible intent for which there is no proof at bar. Defendants at bar used "Olympic" in a non-profit, non-commercial context, to advance political, sociological and philosophical ends. (See Decs. T. Waddell, M. Brown, P. Mark, E. Petersen, S. Lewinstein & Z. Artman Opp.Mo.Prelim.Inj. (8/16/82)). These distinctly non-commercial purposes in defendants' use of "Olympic" fully differentiate their intent at bar from that of the infringer who uses a mark willfully, deliberately, fraudulently or maliciously to take advantage of its owner's goodwill, in order to *profit* by the misuse.

In *Playboy Enterprises Inc. v. Baccarat Clothing Co., Inc.*, 692 F.2d 1272 (9th Cir. 1982), for example, the Court of Appeals' reversal of the trier's determination that the case was not "exceptional" under 15 U.S. Code section 1117, for purposes of the attorneys' fee award sought, was based upon a fact situation that is powerfully different than the one presented at bar. Defendants in *Baccarat Clothing* were found to have deliberately infringed Playboy's trademarks by "premeditatedly" counterfeiting and palming off Playboy's marks. *Id.* 692 F.2d at 1276. The commercial and profit-

making actions and motivations of defendants in *Baccarat Clothing* were as plain, and as crucial to the decision of the Court of Appeals as to the propriety of an attorneys' fees award in that case, as the noncommercial and nonprofit actions and motivations of the instant defendants are plain, and crucially lead to an opposite result under the reasoning of *Baccarat Clothing* as to the purpose of attorneys' fees awards under 15 U.S. Code section 1117. Plaintiffs' citation to *Baccarat Clothing* in support of their argument for attorneys' fees is totally useless to plaintiffs, for the reasons presented above.

USOC argues that "...it matters not that the infringers are serving what they regard as a worthwhile cause as opposed to simply lining their own pockets. As for the effect on the plaintiffs, it amounts to the same thing." (Pl.Memo. Supp.Mo.Atty.Fees 16) This argument is factually unsupported in the case at bar, where USOC has offered no proof of any monetary loss or damage caused to it by defendants' use of the word "Olympic". More important, this argument by USOC wholly misconstrues the content and meaning of section 1117 of the Lanham Act, as it has been written and interpreted. Section 1117 specifically rejects the "effect" test that USOC urges for awards of attorneys' fees; oppositely, section 1117 imposes an "intent" test, requiring that party seeking fees to prove that the trademark infringement was malicious, fraudulent, deliberate or willful. S.Rep. 93-1400, 93rd Cong., 2d. Sess, reprinted in [1974] U.S. Code Cong. & Admin. News, 7132, 7133, cited and discussed in *VIP Foods Inc. v. Vulcan Pet Inc.*, 675 F.2d 1106, 1107 (10th Cir. 1982)(Court of Appeals reversed attorneys' fees award of $18,535. on basis that there was no intent to violate the Lanham Act proved and no monetary loss to plaintiffs proved); *Jellibeans Inc. v. Skating Clubs of Georgia Inc.*, 716 F.2d 833, 846-7 (11th Cir. 1983) (Court of Appeals upheld denial of attorneys' fees award for trademark infringement where trier found that defendants' adoption of a similar unique, *non-generic* mark was "an honest attempt lawfully to

copy a successful mark"); *Burger King Corp. v. Mason*, 710 F.2d 1480, 1495 (11th Cir. 1983). USOC simply has failed to meet this test for availability of attorneys' fees in the case at bar.

Plaintiff USOC also seeks to contend that defendants' conduct represents a willful, deliberate trademark infringement rendering this an exceptional case under section 1117. That contention rests on a highly speculative, distorted and misleading version of purported "facts". For example, in urging that characterization, USOC quotes portions of defendant Waddell's declaration filed August 16, 1982, wrenched wholly out of context, omitting all references to the advice given to Waddell by, among others, a representative of USOC, who told Waddell that a request for permission to use "olympic" was "generally just a formality", and by two sets of legal advisers, to the effect that the defendants' uses of "Olympic" were legally protectible and would be defended. (Dec.T. Waddell Opp.Mo.Prelim.Inj. pp. 5,7). The unsupported proposition by USOC that "defendants, apparently, were looking for trouble", "based" as it is on the speculations of a newspaper columnist about defendants' states of mind, and on the questionable inference by USOC that seeking "national press" equates with "looking for trouble", stoops below all evidentiary principles and legal rules, and will not be ennobled by a response. (Pl.Memo.Supp.Mo.Atty.Fees 11) All of the remaining factual points by USOC concerning defendants' purported willfulness or deliberateness in trademark infringement concern matters arising since issuance of the temporary restraining order in this litigation, and will be discussed in Part III., of this Memorandum, below. The "facts" offered by USOC to show that defendants were deliberate or willful trademark infringers fail to show anything of the sort in the instant case.

C. Equitable Considerations Cut Decisively Against An Award of Attorneys' Fees To Be Exacted From A Nonprofit Public Interest Corporation For Its Use Of A 2700-Year-Old

Generic Word To Describe and Identify An Event Organized To Advance Human Rights And To Overcome Homophobia And Discrimination.

Monetary awards including awards of attorneys' fees in trademark infringement cases are "subject to the principles of equity", and are to be made or not made "according to the circumstances of the case", *Foxtrap Inc. v. Foxtrap Inc.*, 671 F2d 636, 642 (D.C.Cir. 1982). Even in a case determined by the court to be "exceptional" under the standards of 15 U.S. Code section 1117, "...the decision to award attorneys' fees is still within the court's discretion." *Jellibeans Inc. v. Skating Clubs of Georgia Inc.*, cited *supra*, 716 F.2d at 846-7. A grant of attorneys' fees in spite of equitable considerations obviously would constitute a clear abuse of that discretion, under section 1117 of the Lanham Act as incorporated in 36 U.S. Code section 380(a).

In the case at bar, USOC seeks to exact attorneys' fees from a nonprofit public interest corporation and, apparently, in spite of his legal immunity, from its chief officer, in a case where (1.) the defendants sought and had competent legal advice that their use of the world "Olympic" was legally and constitutionally protectible, (2.) the defendants made every effort to resolve the matter amicably, including offering to publish a disclaimer, in spite of no evidence of actual confusion, on every item of defendants' paraphernalia, (3.) the defendants were using a 2700-year-old (*Oxford English Dictionary* (2-vol, ed.)) generic term, that is used to describe and identify events, businesses and organizations all over the world (See Dec. M.Dunlap Opp.Mo.Prelim.Inj. (filed 8/16/82)), to promote a non-commercial and non-profit event, and (4.) the defendants were selected from among numerous groups that hold athletic contests and call them "Olympics", including Armenians, firefighters and police, while plaintiffs continue to permit these other groups to stage their games using "Olympics" without suits or injunctions. (Dec.T. Waddell Opp.Mo.Prelim.Inj. (8/16/82); Dec.T. Waddell Opp. Mo.Atty.Fees para. 3 and Exhibit B thereof, filed herewith).

A more inequitable situation in which to impose an admittedly punitive and exemplary monetary award would be difficult to conjure, even if USOC had proved what it failed to prove at bar—to wit., that defendants engaged in willful, deliberate trademark infringement.

USOC argues that it will be advantageous to it in policing its mark if this Court punishes defendants by awarding attorneys' fees against them. (Memo.Supp.Mo.Atty.Fees 15-16) The purpose of an attorneys' fees award under section 1117 is not to punish, much less to scapegoat—it is to remunerate the mark-holder for attorneys fees necessarily incurred in litigation against wilful, deliberate, malicious or fraudulent infringers. USOC has offered not a single reason that that purpose of section 1117 as incorporated into section 380 of the Amateur Sports Act, along with considerations of equity which must include non-discriminatory and even-handed application of law, should be cast aside in favor of punishing defendants purportedly in order to deter other charitable organizations from using "Olympic". In the case at bar, where defendants' defenses have not been interposed in bad faith, and where overriding considerations of justice not only do not warrant an award of fees, but should preclude it, the application for fees should be denied. *DC Comics Inc. v. Filmation Associates*, 486 F. Supp. 1273, 1284 (S.D.N.Y. 1980); see also cases cited in this subsection, *supra*.

II. AN AWARD OF ATTORNEYS' FEES WARRANTLESSLY WOULD PUNISH DEFENDANTS FOR LITIGATION OF SIGNIFICANT CONSTITUTIONAL AND STATUTORY QUESTIONS.

In granting USOC's motion for summary judgment in this case, this Court specifically rejected defendants' contentions that USOC was and is engaged in "state action" and thus is obligated to respect defendants' rights of free speech and equal protection of the laws. Since this Court's decision on the "state action" issue, the U.S. District Court for the Central District of California has held that USOC *is* engaged

in "state action" in California relative to the 1984 Olympic Games and must comply with the equal protection guarantee of the Fourteenth Amendment. *Martin v. IOC et al.*, CV 83-5847Kn pp. 18-20 (slip opinion)(4/16/84). That ruling as to "state action" on the part of USOC in *Martin* underscores at least the colorability and potential correctness of defendants' assertion at bar, now on appeal, that USOC may be answerable to defendants for violations of their constitutional rights under the First and Fourteenth Amendments. Even assuming *arguendo* that the Court of Appeals affirms this Court's decision that "state action" does not constitute a triable issue of fact in the case at bar, in spite of the clear demonstration by *Martin* that the issue is live and factual, *Martin* establishes that defendants' constitutional position in this action was at least colorable, legitimate and bona fide. To punish a party for litigating its rights under the constitution, where such claim of rights is colorable and is made in good faith, by allowing attorneys' fees to be awarded against that party, would undermine the supremacy of the U.S. Constitution and would seriously chill the protection of constitutional rights via federal litigation. *See also*, 42 U.S. Code section 1988 and its legislative history.

III. THERE IS NO BASIS FOR THE SCURRILOUS AND CALCULATEDLY MISLEADING ACCUSATION THAT DEFENDANTS HAVE ACTED IN CONTEMPT OF THE INJUNCTIVE ORDERS IN THIS ACTION, AND THE ISSUE IS SEPARATE FROM THE AWARDABILITY OF FEES FOR WILLFUL INFRINGEMENT.

Seeking to try defendants' characters or conduct in this case by innuendo, rather than trying the legal and factual issues by rules, USOC accuses defendants of "willful misconduct", of a "direct violation of this Court's preliminary injunction" and of a "contemptuous...act", (Pl.Memo.Supp. Mo.Atty.Fees 12-13). These accusations are "based" by USOC on a patchwork of irrelevant, misleading and calculatedly distorted materials, as follows:

1.) The copy of the cover of SFA&A's newsletter that was provided by USOC to defendants' counsel, and presumably the copy that was provided to this Court, eliminates the third set of colored circles, thus creating an arguable resemblance to USOC's 5-ring symbol, whereas the original issues of this newsletter bear no such arguable resemblance. (Dec.T. Waddell Opp.Mo.Atty.Fees para. 1 and Exhibit A thereof).
2.) The use of the term "Olympic" in the announcement of the Lesbian/Gay Winter Games in Minneapolis/St. Paul does not constitute a violation of any injunctive order in this case, in that defendants' publication of the announcement was nothing but reporting on developments as to an event in which defendants and others enjoined in this action have and had *no* part; it is the group in Minneapolis/St. Paul, and not any of defendants or their associates, that has elected to call its activity the "First Lesbian/Gay Winter Olympic Games of 1986". (Dec.T. Waddell Opp.Mo.Atty.Fees para.2). Defendants submit that their non-promotional reporting of those developments as to the Minneapolis group violates neither the letter nor the spirit of the injunctive orders in this case, and is fully protected by the First Amendment's guarantee of freedom of speech.)
3) The photograph of the Gay Games torchbearers was published opposite a legend identifying the torchbearers as "Former Olypians [sic]". (See Exhibit A to Dec. Waddell Opp.Mo.Atty.Fees at pp.10-11) The copy of these pages provided to this Court by USOC obscures this fact. As set forth in the Declaration of Susan McGreivy, filed herewith, former Olympians such as Ms. McGreivy, whether they be gay or nongay, are fully entitled to wear their uniforms where, when and how they please. (Dec. S.McGreivy Opp.Mo.Atty.Fees, filed herewith). The labelling of Ms. McGreivy's wearing of her Olympic garments as a "contemptuous...act" is an insult to Ms. McGreivy, to the law and to the truth of the situation.

USOC has made no motion for an order to find defendants in contempt of any injunctive order in this action. Such

a motion would afford *due process* to defendants—they would receive notice of the charges against them and an opportunity to be heard and to rebut those charges. USOC apparently chooses not to operate under relevant law governing contempt, instead sliding its groundless and confusing allegations of contempt in its moving papers here, to buoy its unsupported claim for attorneys' fees. In doing so, presumably USOC seeks to confound the Court with its assertion of "willful misconduct" by defendants, "based" on actions occurring *after* the purported trademark infringement in this case was enjoined. USOC's argument also ignores overwhelming record evidence of massive, extraordinary and successful efforts by those enjoined to comply immediately and fully with the injunctive orders issued on the eve of the first Gay Games. (Dec.'s T. Waddell, M. Brown, M. Evans, E. Petersen, H. Thatcher and B. Young Opp.Mo-.Prelim.Inj. (8/16/82)).

Attorneys' fees *may* be awarded to a party prevailing upon a motion for an order finding a trademark infringer to have acted in contempt of an injunction. *W.E. Bassett v. Revlon Inc.*, 435 F.2d 656, 665 (2d Cir. 1970). Such an award of attorneys' fees is distinguished from an award in an "exceptional case" under 15 U.S. Code section 1117, in that an award for contempt follows logically from the seriousness of the contempt and the implicit, necessary willfulness of a contempt. By labelling post-injunction actions of defendants at bar "contemptuous", without an opportunity for notice and hearing of the merits of USOC's claim as to contempt, USOC seeks to encourage this Court to disregard legal standards and the requirement of due process in favor of a prejudicial, unwarranted labelling of defendants' conduct, and to confuse the bases and standards for an attorneys' fee award for willful infringement under 1117 with an attorneys' fee award upon a properly based and litigated claim of contempt. If USOC has actual evidence of a contempt of any of the injunctive orders in this action by defendants, let it make its motion under the law and procedures governing

claims of contempt, so that defendants may have proper notice and hearing of the claim and of their rebuttal to it. USOC's counsel's use of alleged post-injunctive developments in distorted, misleading ways to whip up ill will towards defendants and to create a prejudicial and jaundiced perspective upon defendants' motivations and good faith is scurrilous, improper and cannot *properly* aid USOC in its effort to have attorneys' fees for its litigation about events and actions occurring *prior* to issuance of the t.r.o. in this action.

IV. THE MOTION OF USOC DOES NOT CONFORM TO LOCAL RULE 270 AND DOES NOT PROVIDE A PROPER FOUNDATION FOR AN AWARD OF OVER $96,000.

Local Rule 270-1 requires the parties to a dispute as to attorneys' fees to "meet and confer for the purpose of resolving all disputed issues relating to attorneys' fees before making application." Plaintiffs did not even seek to have such a meeting at bar. Local Rule 270-1 allows for extensions of time for filing for good cause; USOC never sought any such extension in order to fulfill the meeting requirements or any other requirement of Rule 270. Local Rule 270-2 requires the movant to file certain declarations in support of a motion for attorneys' fees—these have not been filed at bar. No declarations conforming with Local Rule 270-2(a) have been filed. The declarations of USOC's counsel as to time and services fail to conform to the specific requirements of Local Rule 270-2(b) and (c) in that they omit information as to how the attorney time was spent, the manner of maintenance of time records and the relevant qualifications and experience of counsel, as well as statements of customary charges or prevailing rates. To grant this motion in spite of USOC's counsel's almost total abrogation of their duties to the Court and counsel for defendants under Local Rule 270 will represent a failure to apply relevant binding law to plaintiffs in deciding their motion. To grant this motion

despite USOC's blatant nonconformance with the requirements of Local Rule 270 also will operate to seriously prejudice defendants, who, because of plaintiffs' counsel's disregard for Local Rule 270, have been deprived of the opportunity timely within the rule to resolve all disputes as to fees without judicial intervention and have been deprived of the opportunity afforded by the declarations specifically required by the rule to specifically and factually challenge, disprove, argue about and rebut plaintiffs' claim of over nine hundred (900) hours of attorney time in this case, at the rate of one hundred dollars ($100.) per hour, allegedly expended and necessitated in this litigation. The departure of USOC from the requirements of Local Rule 270 is both major and seriously damaging to defendants, if this Court finds a basis for any award of fees, and the nonconformance of USOC's papers and making of this motion with Local Rule 270 should warrant outright denial of the motion.

Defendants contend that USOC's moving papers do not provide sufficient information as to the hours expended nor as to the evaluation of the attorney time claimed. No showing of the necessity for three (3) sets of attorneys in three (3) cities to work on this case has been made. *Cf. John B. Stetson v. Stephen L. Stetson Co.*, 58 F.Supp 586, 594 (S.D.N.Y. 1944) ("...I am not convinced that it was necessary for two sets of counsel in two cities to devote the extensive amount of time testified to here to a motion...if the imposition of legal expenses is not to be punitive, the award for such expense must be governed more by what was necessary and reasonable than what was actually paid.") (*contempt* action as to an injunction for trademark infringement). No justification for the hundreds of hours claimed at bar has been offered. The record is wholly inadequate to support the award sought. *Cf. Foxtrap Inc. v. Foxtrap Inc.* cited *supra*, 671 F.2d at 641-2 (record inadequate to support $75,000. damage award); *Boston Professional Hockey Association Inc. v. Dallas Cap & Emblem Mfg. Inc.*, 597 F.2d 71, 73-77 (5th Cir, 1979) (record inadequate to deter-

mine whether defendant was a willful trademark infringer, to justify damage award of $66,000.). The amount of fees requested in the instant case is, in any event, totally disproportionate to the efforts required of plaintiffs' counsel in this litigation. *Compare, Playboy Enterprises Inc. v. Chuckleberry Publishing Inc.*, 687 F.2d 563, 564-5 (2d Cir. 1982) ($5000. attorneys' fees were granted after hearing on injunction and trial in trademark infringement case); *VIP Foods Inc. v. Vulcan Pet Inc.*, 675 F.2d at 1106, 1107, cited *supra* (Court of Appeals reversed award of $18,535. in attorneys' fees). Therefore, even assuming *arguendo* that there were proper legal, factual and equitable bases for an award of attorneys' fees to USOC (all of which are missing in the case at bar), the record does not warrant an award of $96,000+; such an award would be issued in contravention of relevant cases, standards for reasonable attorneys' fees and the provisions of Local Rule 270.

Dated: 10 May 1984

Respectfully submitted,
By: Mary C. Dunlap (Signed)
Attorney for Defendants

(Certificate of service omitted)

File Date: May 10, 1984

(Names & caption omitted in printing, see J.A. 62, above.)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Susan D. McGreivy, Esq. in Opposition to Motion for Award of Attorneys' Fees

I, SUSAN D. McGREIVY, declare:

I am the supervising attorney of the National ACLU Lesbian and Gay Rights Project.

The plaintiff IOC has filed a picture of me lighting the torch of the Gay Games in San Francisco in the summer of 1982, and stated that because I was wearing the sweatsuit issued to me by the United States Olympic Committee as a member of the 1956 United States Olympic Team, the defendants willfully violated the provisions of this Court's order requiring the defendants to cease and desist from using the term "Olympics" or the Olympic five-ring symbol in relationship to the San Francisco Gay Games.

At all relevant times defendants were advised that they should comply completely with the terms of this Court's order and they did so do at considerable expense by removing the term "Olympics" from its documents, billboards, etc.

However, defendants believe this Court's ruling has serious First, Fifth and Fourteenth Amendment and other civil liberties implications which defendants Memorandum of Points and Authorities in opposition to Request for Attorneys Fees forcefully illustrate. This Court's order was therefore appealed.

With respect to my wearing my own sweatshirt: Suffice it to say I am an Olympian. I participated in the 1956 Olympics in Melbourne, Australia as a 400M freestyle swimmer. In

connection therewith, I was given the sweatshirt. At no time was it ever told to me nor even intimated that I could not wear it whenever I wanted to at a place I had the right to be. I doubt such restriction would ever be given or that if it were it would be valid. At the time I wore it when I attended the Gay Games, I believed the First Amendment gave me an absolute right to call myself an Olympian. I believed I had an absolute right to wear the Olympic Uniform I was issued in Melbourne, Australia, at the time of the Gay Games or at any time I desired, contrary to the contentions of plaintiffs. I wore my Olympic Uniform at the opening ceremonies of the Gay Games because I was proud of that uniform and proud of my status as an Olympian. I was asked and agreed to undertake the duty of lighting the torch of the Gay Games because I believed it was an appropriate roll for an ex-Olympian to perform. I wore my officially issued Olympic sweatsuit because I believed it important for youthful members of the Gay and Lesbian community to see that among their numbers there are individuals who competed in the Olympic Games who are not afraid to say they are gay. I believed that my status as a role model would be of greater value by virtue of the act of wearing *my* Olympic uniform.

I state from my heart that as an American citizen it never occurred to me that day in San Francisco that I could not call myself an Olympian or wear my Olympic uniform which I got the old fashioned way—"I earned it!" It never occured to me that such activity was subject to a total application of censorship or perhaps more aptly in this case obliteration. It particularly never occurred to me that my act was in contempt of court.

(Jurat omitted.)

File Date: May 10, 1984

(Names & caption omitted in printing, see J.A. 62, above.)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Thomas F. Waddell in Opposition to Motion for Award of Attorneys' Fees

I. THOMAS F. WADDELL, hereby declare under penalty of perjury:

1. I am a named defendant in the above-captioned action. I am informed and believe that USOC has excerpted and copied parts of the newsletter concerning Gay Games I published by San Francisco Arts & Athletics Inc. (SFA&A), in its moving papers in support of an award of attorneys' fees. Attached hereto is a true and correct copy of the issue of the newsletter that USOC has excerpted, marked "Exhibit A" of this Declaration; it is incorporated herein by this reference.

2. The item on page six (6) of the newsletter that is "Exhibit A" hereof concerning the "First Lesbian/Gay Winter Olympic Games" in Minneapolis/St. Paul was published as a news report item in "Exhibit A", with the intent solely to report as to the existence, location and plans of the organization, not to promote, publicize nor advertise the event. Neither I myself nor any other employee, officer or agent of San Francisco Arts & Athletics Inc. is or has been an employee, officer or agent of the Minneapolis/St. Paul group referred to in the article. The term "Olympic" appearing in the article was selected by the persons organizing the Lesbian/Gay Winter Games; that term was not selected by me nor by any other agent of SFA&A to identify that event.

3. Police continue to stage and publicize an annual "Olympics", with knowledge and tacit approval of USOC.

Upon information and belief, police and their "Olympics" have not been sued by USOC for the purported trademark infringement accomplished by police use of "Olympic" in conjunction with their games. A true and correct copy of the brochure cover and application form for the "1984 California Police Olympics" is attached to this Declaration, marked "Exhibit B" hereof, and it is incorporated by this reference.

4. Immediately upon issuance of the temporary restraining order in this action, I engaged in, and I required and assisted all other persons associated with SFA&A to engage in, exhaustive actions to comply with said t.r.o. These actions are described in detail in the Declarations of myself and others in opposition to the motion for preliminary injunction in this action (Declarations filed 8/16/82)). Upon issuance of the preliminary injunction and of the permanent injunction in this action, I and all others associated with SFA&A have acted and continue to act carefully and attentively to comply with and obey the letter and spirit of those injunctive orders.

Dated: 10 May 1984

Thomas F. Waddell (Signed)

(Exhibits omitted.)
(Exhibits are in Record, Docket #106.)

File Date: May 17, 1984

(Names & caption omitted in printing, see J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Reply Memorandum in Support of Plaintiffs' Motion for an Award of Attorneys' Fees

There is no question that before filing this motion plaintiffs' counsel failed to comply with L.R. 270. That

oversight is keenly embarrassing to counsel but did not, however, prejudice defendants. Their counsel declined an invitation to meet, confer and exchange the information called for by L.R. 270 on the ground that plaintiffs are not entitled to attorneys' fees as a matter of law (Walker Decl., May 16, 1984, p. 1). Nothing which plaintiffs could have provided in advance of the Court's determination that an award of fees is appropriate would have changed that position, defendants' counsel stated (id.). Compliance with L.R. 270 would not, thus, have altered the issue presented to the Court. With this reply, plaintiffs have submitted supplemental declarations in accordance with those comtemplated by L.R. 270 and remain willing to meet and confer with defendants' counsel. We submit that plaintiffs should not be penalized for the lapse of their attorneys.

I. REASONABLE ATTORNEYS' FEES ARE RECOVERABLE AT THE DISCRETION OF THE COURT.

Plaintiffs demonstrated in their opening memorandum that the legislative history of the Amateur Sports Act reveals Congress' intent to permit an award of attorneys' fees at the discretion of the court; a showing of the defendant's willfulness is not required. Defendants erroneously argue that because the Act incorporates the "remedies" of the Lanham Act, it must incorporate the Lanham Act's standard for attorneys' fees awards. The legislative history, however, is to the contrary. It shows that the Act's reference to "remedies" was simply a shorthand way of listing the types of relief available, not an incorporation of a different standard from what had been in the Act all along.

This Court observed in granting summary judgment that the Amateur Sports Act "incorporates only the remedies of the Trademark Act and nothing in the language or the legislative history of section 380 [of the Amateur Sports Act] indicates that the Trademark Act's defenses were to be incorporated as well" (Rptr.Tr.Hrg., Feb. 2, 1984, p. 19). Plaintiffs' entitlement to recovery of attorneys' fees is, thus, created by the Amateur Sports Act, not the Lanham Act.

The latter's requirement of willfulness is not a precondition for a fee award here.

There are obvious reasons for having a stricter standard for awarding attorneys' fees under the Lanham Act. Common trademark law is necessarily uncertain, involving claims and defenses that are often difficult to predict. Consequently, there is a logical basis for conditioning an award of attorneys' fees on a showing of willfulness. By contrast, the Amateur Sports Act specifies precisely what terminology and designations are protected and expressly lists the prohibited uses. Under these circumstances, it is appropriate to award attorneys' fees under a lesser showing.

Defendants' discussion of the *Union Sport Apparel* case does not help them. The fact that willfulness was present in that case does not mean that fees cannot be awarded under a lesser standard.

II. IN ANY EVENT, DEFENDANTS WILLFULLY VIOLATED THE AMATEUR SPORTS ACT.

Even if willfulness is the test, defendants' conduct warrants an award of attorneys' fees. In our opening memorandum, we set forth the abundant evidence of defendants' willfullness. In their opposition, defendants claim no willfulness was involved, but even their version of events tends to confirm plaintiffs' showing.

There can be no dispute that defendants knew from the outset that their use of Olympic designations was prohibited by the Amateur Sports Act. Defendants themselves do not dispute this; instead, they argue that they were advised by their attorney that the plaintiffs' position was "constitutionally flawed" (Def.Mem., p. 6). This argument simply confirms that defendants' use of Olympic designations was intentional and that they knew it was in violation of the Amateur Sports Act. Defendants hoped—erroneously, as it turned out—that the statute would be held unconstitutional. But this hope makes the violation of the Act no less willful. One who violates a statute on the mistaken advice of counsel that the act is unconstitutional has committed no less a

willful law violation because of a desire to precipitate a so-called "test case" than any other willful violator. In *La Raza Unida of Southern Alameda County* v. *Volpe* (N.D.Cal. 1977) 440 F. Supp. 904, defendants challenged the constitutionality of the attorneys' fees provision of the Civil Rights Act (42 U.S.C. § 1988) on the ground that it violated the Eleventh Amendment. Chief Judge Peckham rejected the argument that such a challenge made an award inappropriate and ordered that fees be paid (id., p. 913). The fact that defendants' challenge was purportedly constitutional proved immaterial, and should here as well.

There can be no doubt that defendants used Olympic designations to lend prestige and credibility to their event. Defendants now claim that they did not intend to create confusion, did not intend to create a connection with the USOC, and indeed sought less emphasis on competitiveness (Def.Mem., pp. 5-7). But the issue is whether they willfully used Olympic designations to promote their event, and on that question the evidence conclusively shows that they did.

Defendants' argument that their nonprofit status should insulate them from an award of attorneys' fees (Def.Mem.,p. 7) is similarly misconceived. A nonprofit organization is equally capable of willful statutory violations as a profit-making organization. The absence of a profit motive hardly negates the possibility of willfulness.

Defendants also argue that an award is not permissible because plaintiffs have failed to prove any monetary damage caused to them by defendants' infringement (Def.Mem., p.9). This purported standard goes beyond even defendants' own proffered test for a fee award. Plaintiffs have properly obtained an injunction to vindicate their rights under the Amateur Sports Act, and they have had to expend attorneys' fees to do so. They do not seek additional monetary damages in this motion; they seek the reasonable fees expended in securing their rights.

Defendants' contention that plaintiffs have not submitted sufficient evidence to show defendants' willfulness by an

admission (Def.Mem.,p.10) misses the point. The undisputed evidence of defendants' own actions is sufficient on the willfulness issue. Defendants knew their use of Olympic designations was in violation of the Act from the outset, but they went ahead and used them anyway. Therefore, an award is appropriate even under the willfulness test.

III. DEFENDANTS' PURPORTED "EQUITABLE CONSIDERATIONS" ARE MERELY EFFORTS TO REARGUE THE MERITS.

As claimed "equitable considerations" that should preclude a fee award, defendants simply rehash their arguments on the merits that have been rejected time and time again (Def. Mem., pp. 11-13). They again claim that their use of Olympic designations was constitutionally protected, that their use is protected because the term is generic, and that they are the victims of unlawful discrimination in this infringement action. These arguments were rejected by Judge Conti at the hearing on the temporary restraining order, by Judge Peckham at the preliminary injunction stage, by the Ninth Circuit on the appeal of the preliminary injunction, and by this Court on plaintiffs' summary judgment motion. The act of proffering unsuccessful defenses should not insulate a willful infringer from a fee award.

Defendants mischaracterize plaintiffs' motion as a punitive one. Plaintiffs are not seeking anything more than their reasonable fees expended in this litigation. The effect of an award would be to strengthen USOC's hand in dealing with misusers and to deter unauthorized uses by other infringers. These are plainly the goals of the Amateur Sports Act, and they would be advanced by an award here.

Defendants also attempt to reargue the "state action" issue, citing *Martin* v. *IOC* (C.D.Cal. April 16, 1984; a copy of the opinion is attached hereto as Exhibit A) (Def.Mem., pp. 13-14). This argument is totally irrelevant to this motion; defendants' proper forum is the Ninth Circuit. In any event, *Martin* held that the conduct of the Los Angeles Olympic Organizing Committe, not USOC, constituted "state action"

(Slip Op. at 20).[1] The LAOOC, of course, is not involved in the instant action. Moreover, even if state action were present there, the Ninth Circuit has previously ruled that the form of "speech" engaged in by defendants is not protected by the Constitution.

Nor is there merit to defendants' argument that a fee award would punish them for litigating constitutional issues. Defendants did not elect to seek declaratory relief; they chose to infringe and interpose constitutional defenses that were rejected on four different occasions. But one who violates a statute on the mistaken belief that it is unconstiututional suffers the consequences no less than one whose defense is more mundane (see, e.g., *N.L.R.B.* v. *Joint Council of Teamsters No. 38* (9 Cir. 1964) 338 F. 2d 23, 31-32). The mere assertion of such defenses should not preclude an award; otherwise willful infringers will simply invoke this irrelevant loophole and escape liability.

IV. DEFENDANTS' CONDUCT DEMONSTRATES THE NEED TO STRENGTHEN PLAINTIFFS' ABILITY TO ENFORCE THEIR RIGHTS.

Defendants' newsletter promoting the "Gay Winter Olympic Games" and Ms. McGreivy's use of the official Olympic uniform underscore the need for strengthening plaintiffs' enforcement powers. These incidents show at the very least that further efforts to trade on unauthorized uses of Olympic designations are likely; at most they show that defendants themselves have acted in violation of this Court's orders.

The announcement of the "Gay Winter Olympic Games" is particularly troublesome. Defendants argue that this

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[1] As seen from the opinion, the conduct of the USOC in that case was held to be subject to constitutional restraints only because of its agency relationship with the LAOOC, a relationship not present here. The plaintiffs in *Martin* were, in any event, unsuccessful on their motion for a preliminary injunction. Accordingly, the state action holding of *Martin* may be considered dicta.

announcement is protected by some "reporting" privilege, because the name was thought up by someone other than defendants. It seems evident, however, that defendants are promoting this event in their newsletter—an act that is in violation of the injunction.[2] In any event, plaintiffs are not initiating contempt proceedings with this motion. Instead, we are bringing these events to the Court's attention to show that infringement of Olympic designations is constantly recurring, and a fee award is necessary to permit plaintiffs to vindicate their legal rights without undue expense to the Olympic activities they fund.

V. CONCLUSION

For the foregoing reasons, and for the reasons set forth in our opening memorandum, plaintiffs' motion for an award of attorneys' fees should be granted.

Dated: May 17, 1984.

(Names omitted. See J.A. 5, above.)

By: Robert A Gordon, (Signed)
Attorneys for Plaintiffs
International Olympic Committee
and United States Olympic Committee

(Exhibit omitted. Exhibit is in Record, Docket #107.)

(Certificate of service omitted.)

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[2]Similarly, Ms. McGreivy's wearing of the official Olympic uniform, while perhaps involving some personal expression and use, was also done to promote the Gay Games event.

File Date: May 17, 1984

(Names & caption omitted in printing, see J.A. 5, above.)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Vaughn R. Walker in Support of Plaintiffs' Motion for an Award of Attorneys' Fees

I, *VAUGHN R. WALKER*, declare:

1. I am a partner in Pillsbury, Madison & Sutro, plaintiffs' counsel herein, and make this declaration in support of Plaintiffs' Motion for Attorneys' Fees. I have personal knowledge of the matters referred to hereinafter and if called as a witness could testify competently thereto.

2. On May 10, 1984, I received defendants' papers in opposition to plaintiffs' attorneys' fees motion herein. Before that neither I nor my partner Robert A, Gordon, Jr., were aware that plaintiffs' motion had failed to comply with Local Rule 270. Shortly after reviewing defendants' papers, I telephoned Mary Dunlap, defendants' counsel, apologized for our error and offered to meet with her at a time and place of her convenience to discuss the motion and provide the information called for in L.R. 270. Ms. Dunlap declined this invitation. She stated that she had been entitled to a meeting before the motion was filed and, in any event, was not prepared to compromise her position that plaintiffs are not entitled to an award of attorneys' fees whether L.R. 270 was complied with or not. There was no information that we could provide that would change her position so a meeting would be futile, Ms. Dunlap stated. She also stated that I could represent her position to the Court.

3. In addition to myself, three other lawyers at Pillsbury, Madison & Sutro provided substantive services in connection with the above case: (a) *Noble K. Gregory*, then the

firm's senior appellate lawyer, argued the appeal of the preliminary injunction entered by this Court in the United States Court of Appeals for the Ninth Circuit and reviewed and revised the briefs filed in connection with that appeal. Mr. Gregory also advised and consulted with me in connection with defendants' application to the Ninth Circuit for a stay of the preliminary injunction. (b) *Robert A. Gordon, Jr.*, performed research and prepared briefs, memoranda of points and authorities and correspondence and other tasks at all phases of the litigation following the entry of this Court's temporary restraining order on August 9, 1982. Prior to entry of the temporary restraining order, (c) *Denise Amantea* assisted me in research and preparation of evidentiary materials in connection with the application for a temporary restraining order; due to illness, Ms. Amantea was not further involved in the case. (d) My services consisted of all court appearances in this Court, research, preparation of briefs, legal memoranda, points and authorities, declarations, correspondence and consultation with both the United States Olympic Committee and the International Olympic Committee through its United States Counsel. In addition, (e) *Charles B. Renfrew* and (f) *John B. Bates* consulted trademark counsel for the United States Olympic Committee at the outset of my firm's engagement in this litigation but did not perform further substantive services.

4. The attorneys in my firm regularly maintain a daily time record of the time devoted to various matters. These records specify the identity of the client for whom services are performed, the general subject classification of the work and a brief description of the work actually performed. These time records are maintained in quarter-hour segments and are compiled on a monthly or quarterly basis for use in connection with preparation of billings to clients. The services performed by the various lawyers working on this case were compiled by the firm's business office. For purposes of billing, an internal accounting charge for each lawyer is applied to the time devoted to a particular matter.

These internal time charges reflect the attorney's experience, type of practice, and the firm's costs of operation. These internal charges, which are maintained by my firm as confidential and private matters, are used as a base of information to determine an appropriate fee to be charged to the client for services. That fee, however, generally reflects a variety of other factors peculiar to the work performed. These factors include the outcome of the particular case or proceeding, the efficiency with which work was performed, the difficulty of the matter, the ability of the client to pay and a wide variety of other factors deemed appropriate by the billing partner. During the period of time that they were active in this litigation, the internal accounting charge for Messrs. Bates, Renfrew and Gregory was $180 per hour and for Ms. Amantea was $75 per hour. Mr. Gordon's internal time charge was $100 per hour until July 31, 1983 when it became $120; on January 1, 1984, Mr. Gordon's hourly charge was revised to $135. My internal charge was $140 per hour until July 31, 1983, when it became $150 and then $160 on January 1, 1984.

5. I am the billing partner in my firm for the United States Olympic Committee and the International Olympic Committee. In determining the fees charged, I used the foregoing internal time charges only as a guide. Because the United States Olympic Committee and the International Olympic Committee are nonprofit, public service organizations, all bills rendered by my firm for services performed were at two-thirds or less of the internal hourly charges. This ratio was selected as roughly the amount necessary to cover the firm's costs associated with these services. Accordingly, my firm's services were performed on this matter at essentially a non-profit basis. The amount of the fees sought by my firm with this motion was actually billed to these clients.

6. The qualifications of the lawyers who devoted time to this case are as follows: (a) *Mr. Renfrew* was educated at Princeton University (A.B. 1952) and the University of Michigan (J.D. 1957); he was admitted to the State Bar of

California in 1956 and practiced at Pillsbury, Madison & Sutro as an associate from the year of his admission until 1965, when he was elected a partner. Mr. Renfrew left the firm in 1972 to become a United States District Judge for the Northern District of California, leaving that position in 1979 to become Deputy Attorney General of the United States. He returned to the firm in 1981 and practiced with the firm until 1983. (b) *Mr. Gregory* was educated at the University of California, Los Angeles (A.B. 1939) and Boalt Hall School of Law, University of California (LL.B 1946). He was admitted to practice in California in 1946 and served as law clerk to the Honorable Roger J. Traynor, then a Justice of the California Supreme Court, before coming to the firm in 1948. Mr. Gregory was elected a partner in 1956 and specialized in public utility and regulatory matters, trial work and later in appellate work until his death in 1983. (c) *Mr. Bates* was educated at Stanford University (A.B. 1940) and attended law school at Stanford and the University of California, Boalt Hall (LL.B. 1947). He joined Pillsbury, Madison & Sutro in 1947 as an associate and became a partner in 1953. His work was primarily in the trial of cases, and he is a fellow of the American College of Trial lawyers. At the time of his work on the present case, he was the firm's managing partner. (d) *I* was educated at the University of Michigan (A.B. 1966), did post-graduate work in economics at the University of California at Berkeley and attended law school at the University of Chicago and Stanford University (J.D. 1970). Following law school, I subsequently served as law clerk to the Honorable Robert J, Kelleher, United States District Judge for the Central District of California. Following admission to the State Bar, I became an associate at Pillsbury, Madison & Sutro in 1972 and a partner in 1978, devoting the bulk of practice to business litigation and governmental matters. (e) *Mr. Gordon* was educated at Yale University (B.A. 1973), and the University of Virginia Law School (J.D. 1976) where he served as Notes Editor of the University of Virginia Law Review. He was admitted to

practice in California in 1976 and until 1977 was law clerk to the Honorable James R. Browning, Chief Judge of the United States Court of Appeals for the Ninth Circuit. In 1977, he became an associate of Pillsbury, Madison & Sutro and was elected a partner in 1984, devoting a substantial portion of his practice to litigation involving securities matters and pension plans. (f) *Ms. Amantea* was educated at the University of California at San Diego (B.A. 1975; M.A. 1976). graduating magna cum laude, and the University of Southern California (J.D. 1979) where she was Associate Editor of the law review. She was admitted to practice in 1980. Ms. Amantea served as research attorney to the Honorable William Newsom, Justice of the California Court of Appeal, during 1980 before coming to Pillsbury, Madison & Sutro where she has been an associate since 1981, practicing in the area of general litigation.

(Jurat omitted)

File Date: May 17, 1984

(Names & caption omitted in printing, see J.A. 5, above.)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Supplemental Declaration of Edward T. Colbert in Support of Plaintiff's Motion for an Award of Attorneys' Fees

EDWARD T. COLBERT declares as follows:

1. I am a member of the firm of Beveridge, DeGrandi & Kline, attorneys for plaintiffs in this action. I have personal knowledge of the matters hereinafter set forth, and if called as a witness could testify competently thereto.

2. Beveridge, DeGrandi & Kline acts as general counsel to plaintiff United States Olympic Committee ("U.S. Olympic

Committee"). Since this litigation began in August 1982, several attorneys of this firm have provided legal services in connection with this action, in excess of 400 hours. The specific projects and the attorneys assigned thereto are shown in detail on the attached schedules I through VIII. Beveridge, DeGrandi & Kline has actually billed its clients for this work.

3. In addition to the actual hours shown in schedules I through VIII, the U.S. Olympic Committee was charged for actual disbursements plus service charges, as well as incidental clerical expenses including, *inter alia*, messengers, word processing, telephone, duplication and travel expenses in an amount in excess of $6,300.

4. The qualificationsof Messrs. Richard G. Kline, Edward T. Colbert and Joseph D. Lewis are shown generally in the attached excerpts from the Martindale-Hubbell Legal Directory. In addition, the firm of Beveridge, DeGrandi & Kline has developed particular expertise in the area of sports and sports organizations and litigation in matters related thereto, as a result of long representation of the U.S. Olympic Committee and the Amateur Athletic Union of the United States, prior to becoming general counsel to the U.S. Olympic Committee.

5. The reasonable and normal hourly fees charged by the attorneys of Beveridge, DeGrandi & Kline in this action, are the same as are charged in all matters upon which those individuals work. They are, at various times:

Richard G. Kline	July-Oct. 1982	$150 per hour
	Nov. 1982-Aug. 1983	$160 per hour
	Sept. 1983-Present	$160 per hour
Edward T. Colbert	July-Oct. 1982	$100 per hour
	Nov. 1982-Aug. 1983	$105 per hour
	Sept. 1983-Present	$125 per hour
Joseph D. Lewis	July-Oct. 1982	$ 75 per hour
	Nov. 1982-Aug. 1983	$ 80 per hour
	Sept. 1983-Present	$ 90 per hour

6. Time records are kept on a daily basis, in increments of tenths of an hour, and must reflect the actual time worked,

not an estimate of value for the services rendered. That data is entered in electronic data processing equipment and printed copies of all data are maintained. The calculations of dollar value by projects and attorney are taken directly from the existing business records of Beveridge, DeGrandi & Kline and reflect a simple calculation of hours times the regular billing rate of each attorney.

7. The attorneys of Beveridge, DeGrandi & Kline, acting as general counsel to the U.S. Olympic Committee, undertook to assure that there was no duplication of effort between themselves and co-counsel, or themselves and local counsel, as may be seen by a comparison of the hours expended, and the areas in which expended, among the several firms which have submitted declarations in support of a motion for attorneys fees. It was important that the firm of Beveridge, DeGrandi & Kline, having ease of access to the clients as well as particular expertise in this area, participate actively with local counsel, more familiar with trial practice in this court. As a result, counsel for plaintiffs were able to divide the labor in a fashion to maximize efficiency, and consulted frequently to assure lack of duplication.

(Jurat omitted.)
(Exhibits other than accounting omitted.
Exhibits are in Record, Docket #110).

I.

Preparation and filing of complaint and answers to counterclaims, including consultation with client, consultation and coordination with co-plaintiffs' counsel, retention of and instructions to local counsel, and legal research on issues:

	Hours	**Service Charge**
Richard G. Kline	45.2	4,347.50
Edward T. Colbert	14.6	1,460.00
Joseph D. Lewis	13.3	997.50
Richard Gresalfi	35.5	1,420.00

II

Preparation for temporary restraining order hearing, including memoranda, declaration, exhibits and legal research, as well as attendance at and participation in such hearing:

	Hours	Service Charge
Richard G. Kline	36.4	5,460.00
Edward T. Colbert	22.4	2,240.00
Joseph D. Lewis	3.2	240.50

III

Preparation for preliminary injunction hearing, including memoranda, declaration, exhibits and legal research, as well as attendance at and participation in such hearing:

	Hours	Service Charge
Richard G. Kline	32.3	4,845.00
Edward T. Colbert	1.5	150.00
Joseph D. Lewis	25.0	1,875.00

IV.

Preparation for and response to motion to stay pending appeal:

	Hours	Service Charge
Richard G. Kline	7.5	1,125.00
Joseph D. Lewis	4.0	310.00

V.

Preparation for trial, including development of discovery, strategy, and selection and retention of consultants and witnesses, as well as responses to discovery requests by defendants:

	Hours	Service Charge
Richard G. Kline	5.8	5,231.00
Edward T. Colbert	48.6	5,103.00
Joseph D. Lewis	2.8	224.00

VI.

Preparation of brief on appeal, including legal research and response to petition for rehearing:

	Hours	Service Charge
Richard G. Kline	28.7	5,315.00
Edward T. Colbert	12.8	1,344.00
Joseph D. Lewis	18.9	1,512.00

VII.

Preparation of motion for summary judgment, including memorandum and declarations, as well as legal research:

	Hours	Service Charge
Richard G. Kline	14.2	2,272.00
Edward T. Colbert	3.7	462.00
Joseph D. Lewis	14.7	1,204.00

VIII.

Preparation of motion for attorney fees:

	Hours	Service Charge
Richard G. Kline	4.0	640.00
Edward T. Colbert	2.4	300.00
Joseph D. Lewis	8.2	738.00

File Date: May 17, 1984

(Names & caption omitted in printing, see J.A. 5, above.)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Supplemental Declaration of John I. Huhs in Support of Plaintiffs' Motion for an Award of Attorneys' Fees

I, John I. Huhs declare as follows:

1. I am a member of Pisar & Huhs, attorneys for plaintiff

International Olympic Committee in this action. I have personal knowledge of the matters referred to hereinafter and if called as a witness could testify competently thereto.

2. I performed most of the services devoted to this action by my firm; my partner Samuel Pisar also spent some time relative to this case. My firm has represented the International Olympic Committee since 1979. My partner and I maintain a daily diary of appointments and work broken down by quarter hours by client and work performed. Because of the nature of the services which we customarily perform for the International Olympic Committee we do not generally break out the individual matter on which work is performed. In connection with this case, we followed our customary practice. From the records of work performed for IOC it is possible to identify the number of hours devoted to the above action, and I have reviewed my daily diaries and the files and records of my firm pertaining to the above action and am able to state that my partner and I spent at least 89 hours of work on this case. These services included consultation, usually by international long distance telephone conversations with officials of the IOC regarding the IOC's participation in this lawsuit, consultations with co-counsel, review of pleadings and other documents, preparation and review of correspondence and files, travel to California and attendance at the Preliminary Injunction hearing on August 19, 1982.

3. With reference to my qualifications and experience, I am admitted to practice law in New York and the District of Columbia. I received a BA degree from the University of Washington in 1966 and MBA and JD degrees from Stanford University in 1970. While at law school I was comment editor of the Stanford Law Review. I have practiced law in New York at all times since 1971 with the exception of 1974-1976 when I was a staff member of the Office of Management and Budget, National Security and International Affairs Management Division serving at the White House during President Ford's administration. I am

the author of "Trade Preferences for Developing Countries: Options for Ordering International Economic and Political Relations," Stanford Law Review, 1968; "Developing Trade with the Soviet Union," Columbia Journal of World Business, 1983; "U.S. Boycott of Soviet Union; Legal and Administrative Framework," Boycott Law Bulletin, 1980. I am a member of the American and International Bar Associations, the District of Columbia Bar and the American Society of International Law. I serve as chairman of the Committee on Soviet and Eastern European Law, Section on International Law, the American Bar Association and from 1977 to 1982 was vice-chairman of th Committee on East-West Trade and Investment. My practice has almost exclusively been in the area of international law and transnational commercial relations. Until 1983 the customary hourly charge for services which I performed was $165 per hour. Since 1983 my customary hourly fee has been $175.

4. My partner Samuel Pisar was admitted to practice law in the District of Columbia, California, New York and a barrister at law in the United Kingdom and served as Conseil Juridique in the Republic of France. Mr. Pisar received his LL.B degree in 1953 from the University of Melbourne, a LL.M. in 1955 and S.J.D. in 1959 from Harvard Law School, and a Doctor of Law from the University of Paris in 1966. From 1961 to 1962 he served as an advisor to the Joint Economic Committee of Congress and in 1961 was a member of the President's Task Force on Foreign Economic Policy. In 1960 Mr. Pisar served as a consultant to the Committee on Foreign Commerce of the United States Senate. He authored "Coexistence and Commerce," McGraw-Hill, Inc. 1970; "Of Blood and Hope," Little, Brown and Company, 1980. Mr. Pisar speaks in addition to English, French, German and Russian. At all times during the course of this action his fee was $250 an hour.

(Jurat omitted.)

File Date: May 24, 1984

(Title omitted in printing.)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Reporter's Transcription of Proceedings
Motion for Attorneys Fees

Before: The Honorable John P. Vukasin, Jr., Judge

APPEARANCES:
FOR THE PLAINTIFFS:
VAUGHN R. WALKER, ESQUIRE
PILLSBURY, MADISON & SUTRO
225 BUSH STREET
MAILING ADDRESS: P.O. BOX 7880
SAN FRANCISCO, CA 94120

FOR THE DEFENDANTS:
MARY C. DUNLAP, ESQUIRE
ATTORNEY AT LAW
425 STAPLES AVENUE
SAN FRANCISCO, CA 94112

COURT REPORTER:
RAYMOND LINKERMAN
450 GOLDEN GATE AVENUE
BOX 36052
SAN FRANCISCO, CA 94102

The Clerk: Calling Civil Matter C-82-4183, International Olympic Committee versus San Francisco Arts & Athletics. Counsel, please step forward and state your appearances.

Mr. Walker: Good Morning, Your Honor, I'm Vaughn Walker, V-a-u-g-h-n, W-a-l-k-e-r, for plaintiffs. And with me is Ronald Rowan, General Counsel of the United States Olympic Committee.

The Court: Thank you.

Ms. Dunlap: Mary Dunlap for the defendants. Good morning, your Honor. Dr. Thomas Waddell, who is one of the main defendants, is with me this morning.

The Court: Thank you.

All right. The background of this case is that the United States Olympic Committee was granted exclusive use of the word "Olympics," along with any signs, emblems or words. This grant was embodied in what we call the Amateur Sports Act, 36 U.S. C. Section 371, and the following sections. The United States Olympic Committee was specifically granted the power to protect its rights under this Amateur Sports Act.

So far as these parties are concerned, these are the facts as I understand them: That the first contact between the USOC and the defendants occurred in December of 1981, when there was an exchange of correspondence. Apparently letters crossed in the mail. The USOC's letter requested defendants to cease using the USOC's trademark, while the defendants' letter requested permission to use the trademark.

Later, in January of 1982, I think it was, there was a telephone conversation between Colonel Miller of the Committee and the defendant in this case, Waddell, and the result of this telephone conversation was a letter from the defendant Waddell to Colonel Miller, indicating that the defendant would cease using the trademark. And then eight days later, the defendants the same defendant wrote to Miller indicating that the defendants intended to use the Olympic designation. And plaintiff responded in August of 1982 with the filing of this suit.

I think those — that's essentially the facts that led up to the litigation, the background of this, and I think — I cite it because — and relate it because I think it may have a bearing

The Court *(cont.)*: on the ruling.

When the suit was filed, a temporary restraining order was immediately granted, and then on August 20th, a preliminary injunction was granted, both of those in another court, prohibiting defendants from using the word "Olympic" in connection with the promotion of any of its athletic activities. That injunction was appealed, and the Ninth Circuit, in June of 1983, affirmed the grant of the preliminary injunction.

In February of this year, in this court, summary judgment was granted to the plaintiffs, and that order of this court is on appeal to the Ninth Circuit.

Now the plaintiff moves for attorneys' fees. They appear to be substantial, and is referred to in various places, but frankly, I have not found any particular place where it was totaled. Do you have a total anywhere in your papers?

Mr. Walker: Yes, your Honor, I believe it's $96,600.

The Court: Do you have a total in your papers?

Mr. Walker: I'm not sure whether I have a total in the memorandum or not. I —

The Court: Has anybody computed all the figures in your memorandum?

Mr. Walker: Yes. I computed it when I prepared a proposed order. And the total was, I'm sorry, $96,900.

The Court: Ninety-six thousand —

Mr. Walker: —900.

The Court: — Nine hundred dollars. Have you computed them Ms. Dunlap?

Ms. Dunlap: That appears to me to be the total that the plaintiffs request, your Honor, $96,900.

The Court: Ninety-six six or ninety-six nine?

Ms. Dunlap: My computation is ninety-six six, your honor, but since it's not my request, I would hesitate to insist upon my figure.

The Court: I am familiar with your arguments. I had one preliminary question in my mind, and that is, whether or not this motion might be premature in view of the fact that there is an appeal pending, but it might take a year in the Ninth

The Court: *(cont.):* Circuit, might go on to the Supreme Court, so I don't — I just started that — that thought rather quickly.

All right. I understand the remedies under the Amateur Sports Act available to the parties are the same available under the Trademark Act of 1946. That does include attorneys' fees, and does provide that courts may award reasonable attorneys' fees.

Let me state my understanding of your respective arguments and then maybe you can amplify it. The plaintiff argues that the reference to the Trademark Act is solely to indicate the nature of the remedies available, and to ascertain the standard to be used, we should look to the legislative history. And there's authority to the effect that the Senate proposed giving the Court complete discretion.

The defense argues that the Trademark Act remedies should necessarily embody the case law developed thereunder, and that while the case law — the standard in the case law for attorney's fees is that it's discretionary with the Court, certain factors are to be taken into account, and these factors are whether the acts of infringement can be characterized as malicious, fraudulent, deliberate or willful.

Would you like to take issue with my understanding of your position, Mr. Walker, or to amplify what I understand to be your position?

Mr. Walker: I do not wish to take issue with that understanding at all. I concur with it, your Honor. I would only amplify in one respect, and that is, we believe that the record here does make out a case of a willful violation of the Act, and the exceptional circumstances referred to in the Lanham Act are also...

The Court: Is that microphone on?

Mr. Walker: I believe it is. We believe that even if your Honor concludes that willfulness is a requirement for an award of attorneys' fees here, that the facts here establish a willful violation. In addition, the Lanham Act addresses the situation where attorneys' fees may be granted in what is

Mr. Walker: *(cont.):* described as exceptional cases. We believe this fits within that description.

The Court: Why?

Mr. Walker: For two reasons, your Honor. Number one, the violations here were undertaken despite the exchange of correspondence and communication which your Honor referred to at the outset. Clearly, the defendants knew of the USOC's position, its belief that the USOC was exclusively entitled to Olympic terminology and symbols, and to their use, and nonetheless, the defendants went ahead and put together games using Olympic symbols and terminology. But —

The Court: Which they referred to as the Gay Olympics; is that right?

Mr. Walker: That's correct. Their argument on willfulness, and their claimed lack of willfulness, comes down to the point that they say they used Olympic terminology and symbols solely to spark a test case.

The Court: Solely to what?

Mr. Walker: Spark a test case, because they wished to challenge the constitutionality of the USOC's proprietary right in these symbols and in these terminologies. But thereby, if they — if they won the test case, then they would have used the USOC's good will and the USOC's rights to that mark. But they lost the case. The constitutionality of the Act has been upheld at all stages, by Judge Conti, by Judge Peckham, and by two panels in the Ninth Circuit, and by your Honor when he granted summary judgment.

The Court: Okay. Thank you. Ms. Dunlap.

Ms. Dunlap: Thank you, your Honor. I'll take this opportunity primarily to respond to the reply brief of the defendants filed last week — plaintiffs, rather, filed last week.

Let me say at the outset that the Court's summary of the facts as to this exchange of letters over the winter and spring of 1982 could be summarized as Judge Peckham summarized it at page 5 of his order granting the preliminary injunction as

Ms. Dunlap: *(cont.): follows:*

> "It is likely that each party was under the impression that it had forced its wishes upon the other and that each had achieved its respective goals."

That would seem to me to be hardly a finding of willfulness, and I point out in that regard that Judge Peckham in his opinion found no tendency intentionally to deceive or mislead or in some other way manipulate the public.

The plaintiffs in this case have made a number of arguments in their reply memorandum which must be addressed, because they were based on entirely false premises about what the defendants did in this case, and about what the defendants' intent can be inferred to be.

First of all, though, there's the little matter of local rule 270, with which the plaintiffs admit they did not comply. They argued to the Court that although they comply with the local rule, they didn't file the declarations required, they didn't request the meeting that the rule requires them to request, that because it was proposed to me after the motion was filed, and after the opposition was filed, that we might meet, and because I said I didn't see a purpose in such meeting, unless the Court required one of me, that we have not been prejudiced. Nothing could be more inaccurate.

In this case, the plaintiffs have filed declarations purporting to — to support ninety-six thousand some odd dollars in attorneys' fees, which are entirely inadequate declarations, devoid of detail, inaccurate in terms of presenting for defense counsels' challenge an accounting of hours; and finally, they're presented, not at the start of the action, at the phase where the motion is filed, but by way of reply. The idea that the defendants are not prejudiced by this late and inadequate and incomprehensible set of filings is entirely inappropriate.

Let me address the merits of the plaintiffs' motion. They have argued that the Amateur Sports Act incorporates the remedies under the Lanham Act, as the Court itself found in granting summary judgment in this case, but that position is entirely meaningless, if Congress did not also intend to

Ms. Dunlap: *(cont.):* incorporate the standards for relief under the Lanham Act, otherwise it would be no more necessary for the U. S. Olympic Committee to show a basis for relief than for it to file suit. That is to say, they could walk into court under their theory of the Amateur Sports Act, ask for an injunction, tell the Court that it need not look at any standards for equitable relief, that they were simply the U.S. Olympic Committee and were entitled to relief, and they would get their relief. I don't think that's what the Amateur Sports Act means, I don't think that's what Congress intended, and I don't think that's what any of the legislative history they cite supports.

Their position seems to be one of tossing equity and trademark law out the window in favor of advancing the U.S. Olympic Committee. Again, I don't think Congress intended anything of the sort.

It's interesting here that the plaintiffs take the position that this Court may find on the state of the record that these defendants intentionally violated the law in using the word "Olympic." It's interesting, because it contrasts poignantly with their position on summary judgment that the intent of the parties in this case was irrelevant, that this Court need not find facts on that point, that there were no triable issues and that the defendants were not entitled to a trial. On the very issue that they now stand before this Court and say that the record precludes the Court from finding other than willfulness, they argue in favor of no trial, that the question of willfulness, the question of deliberateness was one the Court need not resolve.

Let me say in this regard that if it is — if the test for attorneys' fees is the discretion of the Court, then the history of equity is that that discretion should not be defined by, as it was historically spoken, "the length of the Chancellor's foot," but rather by equitable considerations.

The equitable considerations to be taken into account in this case are the intent of the parties, the nature of the information provided to them, the state of the law at the time

Ms. Dunlap: *(cont.)*: that they acted, and the nature of the trademark itself. Here I think there was a vivid contrast between the word "Olympic," twenty-seven hundred years old, generic, descriptive, and in wide — worldwide usage, as the record establishes, and, for example, the Playboy bunny trademark, which has been the source of considerable injunctive relief in the Ninth Circuit. What a great contrast between those two trademarks in terms of their history, their nature, and the understanding when people use them.

Let me summarize this way: there is no proof of a willful, deliberate, fraudulent or malicious use of the word "Olympic" by any of the defendants in this case. If that is the standard, and we submit, under the Lanham Act, and the Amateur Sports Act, read harmoniously with it, that that is the standard, it seems to me that the plaintiffs' position about willfulness is not really borne out by the record. They argue in their reply, quote:

> "There can be no dispute that defendants knew from the outset that their use of Olympic designations was prohibited by the Amateur Sports Act. Defendants themselves do not dispute this."

This entire action, the defendant's counterclaims, the arguments made to this Court and on appeal dispute this to the Nth degree. The defendants do not take the position that they knew or could have known from the outset that their use of "Olympic" was prohibited, because indeed the only case decided by any court about the use of the word "Olympic," as of the time that the U.S. Olympic Committee filed suit in August of 1982, was the case *STOP The Olympic Prison versus United States Olympic Committee*, decided by the Federal District Court in New York, and previously cited to this Court.

In that case, a political, philosophical and symbolic use of the word "Olympic" by an organization organized primarily not for profit, like the defendants here, was permitted by court order to use the word "Olympic" in spite of the U.S. Olympic Committee's position. And I note that in the

Ms. Dunlap: *(cont.):* ***"STOP"*** case, in dictum, the court said that it — that it read the first amendment as precluding the U.S. Olympic Committee from having the kind of monopolistic control over noncommercial used of the word that the U.S. Olympic Committee there contended it had.

Moreover, the state of the law supported the defendants as of the time the suit was filed, and so did the U.S. Olympic Committee's own behavior.

As of August of 1982, the United States Olympic Committee had never brought suit —

The Court: You're not addressing yourself to the issue of whether or not attorneys' fees should be awarded in this case.

Ms. Dunlap: Yes, I am, your Honor, and —

The Court: No. You're arguing your appeal to the Ninth Circuit.

Ms. Dunlap: Your Honor, all of these things bear on the willfulness of these defendants. The plaintiffs have said to this Court defendants willfully, deliberately, fraudulently, maliciously used the mark. If the state of the law at the time suit was filed upheld their right to use the word, for the uses that they chose, and if the state of the law in terms of the USOC's own behavior toward other users of the word suggested that the U.S. Olympic Committee had no intention of suing any party, then indeed, to turn around and say that these defendants willfully used the mark is a serious twisting of the facts. And so with respect, your Honor, I believe that I am addressing precisely the issue before this court, which is, have the plaintiffs in this case shown that the defendants willfully or deliberately misused the mark given to the U.S. Olympic Committee by Congress.

To continue, the U.S. Olympic Committee, as of August of 1982, had never filed a lawsuit under the —

The Court: That has nothing to do with this issue this morning. We're here to find out whether or not, under the law, they are entitled to attorneys' fees.

Ms. Dunlap: The plaintiffs in this case argue that, quote,

Ms. Dunlap: *(cont.):* at page 5 of their reply brief:

> "There can be no doubt that defendants used Olympic designations to lend prestige and credibility to their event."

The record betrays that. The purposes of the defendants using the word "Olympic" are set for the very plainly and unambiguously in the declaration of Dr. Waddell —

The Court: Ms. Dunlap, I'm going to have to ask you to direct yourself to the issues here.

Ms. Dunlap: Your Honor, I'm addressing myself to the issues raised by the reply brief of the plaintiffs in this case. They argue —

The Court: If they raised an irrelevant issue, I'm not going to pay attention to it either.

Ms. Dunlap: All right, your Honor, but it's not irrelevant that they contend that this court can conclude on this record that these people did something on purpose, when in fact the state of the law and the state of the facts supported my clients' actions at the time. Those were the points that I was perhaps belabored in making.

Now, in this case, the suggestion of the plaintiffs throughout both their — both their memorandum in chief and their reply brief is that somehow the defendants in this case went out, took the word "Olympic" knowing it belonged to someone else and misused it for a purpose that violated the Amateur Sports Act. That represents a very severe manipulation of the facts in this case.

When the temporary restraining order was issued by Judge Conti, as the record shows, as declarations by half a dozen people show, these defendants turned around and obediently removed the word "Olympic" from every one of the items that were to be sold by this nonprofit organization in support of these nonprofit activities.

The Court: And subsequently picked up the name "Olympic" again, didn't they?

Ms. Dunlap: The word "Olympic" appears in a newsletter—

The Court: Didn't they?

Ms. Dunlap: —of the games, an entirely nonpromotional, noncommercial context, a matter I contend is entirely protected by the First Amendment, as much as any reporter's story —

The Court: Ms. Dunlap, you are capable of a better argument than you're presenting at this time.

Ms. Dunlap: Your Honor, the argument is this, that the First Amendment plainly entitles anyone to publish an announcement about someone else's Olympics, whether those Olympics are a — are later held by some court to be a trademark infringement or not.

The Court: You aren't arguing the merits of this case, Ms. Dunlap. That's not the issue before this court —

Ms. Dunlap: Well —

The Court: —And we have a courtroom full of attorneys who are waiting to argue their cases, and if you're —

Ms. Dunlap: The Plaintiffs —

The Court: Please — if you're not going to address yourself to the issues before me here, I want to hear the other attorneys.

Ms. Dunlap: As the court knows, it is the plaintiffs' attorney in this case who put before the court the claim that by publising an announcement about the winter, quote, Gay Olympic Games in the midwest, these defendants went into contempt. That was the argument. I'm addressing that point, because, one, it doesn't show willfullness, and two — and two, it was an entirely protected use of the term. Likewise, with the appearance of a photograph of two former U.S. Olympians, who were fully entitled to wear their uniforms at the opening ceremonies of the Gay Games.

At the crux of the motion, and the greatest problem with it here, is that the U.S. Olympic Committee has twisted the facts, ignored the law, swept aside the equities, pushed aside all considerations of public policy, and we submit avoided the constitution, and said, in effect to this court, "We're the U.S. Olympic Committee, please give us what we want." For

Ms. Dunlap: *(cont.)*: those reasons, the motion should be denied.

The Court: Thank you. The matter is submitted.

This court does not have to determine whether the standard is the legislative history, as the plaintiff advocates, or the case law developed under the Trademark Act, as the defendant advocates, because even accepting the defendants' standard, it appears that an award of attorneys' fees is appropriate in this case.

Defendants' acts surely can be characterized as deliberate and willful. They were notified in December of 1981 and in January of 1982 that their acts were considered infringing; they nevertheless proceeded with their infringing actions. And they were aware that the USOC would bring an action; yet, they deliberately and willfully continued their course of conduct.

Defendants contended here that their defense was a credible defense, and therefore, an award of attorneys fees would be inappropriate.

The standard, however, is not whether the defense was frivolous or not. The willful or deliberate nature of the defendants' actions, not the quality of the defense, is of concern to the court.

Addressing one of the issues raised by Ms. Dunlap, let me respond by saying that one who violates a statute on the advice of counsel that the statute is unconstitutional has committed no less a willful violation because of their desire to precipitate a so-called test case than any other violator.

I wish to also observe that an award of attorney's fees would also achieve the goals of the Amateur Sports Act. The purpose of that act was to develop, foster and promote amateur athletics in the United States. The goal is frustrated when large amounts of funds are diverted to conduct unnecessary legal action. An award of attorneys' fees would replenish the funds channeled away from the promotion of amateur athletics in the USOC's athletic program.

It is the opinion of the court that the public interest is best

The Court *(cont.)*: served by having the costs necessary for enforcement of the Amateur Sports Act be borne by those who violate that statute. Therefore, the plaintiffs' motion for attorneys' fees is granted in the sum of $96,600.

Madam Clerk, please call the next case.

Mr. Walker: I have an order, your honor.

The Court: Would you prepare the order, if you will, please.

A Spectator: How much did you get?

(Pause in Proceedings.)

The Court: I'm going to ask you to prepare another order embodying the comments the court made —

Mr. Walker: I shall. Thank you, your honor.

The Court: — In open court.

(Proceedings Adjourned.)

(Reporter's certificate omitted in printing.)

File Date: September 21, 1984

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Order issued September 21, 1984

The order of the District Court granting attorneys' fees to plaintiffs is reprinted as Appendix 5, pages 67-76, in the Petition for Certiorari.

(Note: That order is miscaptioned "United States Court of Appeals for the Ninth Circuit." It should be captioned "United States District Court for the Northern District of California.")

File Date: September 28, 1984

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Notice of Appeal

NOTICE IS HEREBY GIVEN that defendants and cross-plaintiffs appeal from the Order Granting Plaintiffs' Motion For Award of Attorney Fees filed in this action on September 21, 1984. This notice is filed pursuant to Rules 3(a) and 4(a)(1) of the Federal Rules of Appellate Procedure.

Dated: September 28, 1984

Mary C. Dunlap, (Signed)
Attorney for Defendants
and Cross-plaintiffs

File Date: April 1, 1985

INTERNATIONAL OLYMPIC COMMITTEE, a corporation organized and existing under the laws of Switzerland; UNITED STATES OLYMPIC COMMITTEE, a corporation organized and existing under the laws of the United States of America,

Plaintiffs/Counter-Defendants/Appellees,

vs.

SAN FRANCISCO ARTS & ATHLETICS, a California corporation, and THOMAS P. WADDELL,

Defendants/Counter-Plaintiffs/Appellants.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 84-1759
84-2528
84-2713
DC# C82-4183 JPV
Northern California

Order

Before: WALLACE, SCHROEDER and FLETCHER, Circuit Judges

Appellants' motion for a stay of judgment pending appeal is granted. Fed. R. Civ. P 62(g).

Appeal 84-2713 is dismissed as moot. The completion of the judgment debtor's examination mooted appellants' challenge to the scope of that examination.

RE: International Olympic Committee v. San Francisco Arts & Athletics—Nos. 84-1759, 84-2528, and 84-2713

WALLACE, Circuit Judge, dissenting:

I dissent from the grant of a stay of judgment pending appeal without any requirement that appellant post a supersedeas bond or other security. The posting of a bond is generally required before a stay of judgment pending appeal may be granted, *see* Fed. R. Civ. P. 62(d); Fed. R. App. P. 8(b), unless the appellant can demonstrate "a present financial ability" to pay the judgment, in which case a court may "substitute some form of guaranty" other than a supersedeas bond. *Poplar Grove Planting & Refining Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979). If the posting of a full bond would otherwise "impose an undue financial burden," the court may similarly "fashion some other arrangement for *substitute* security through an appropriate restraint on the judgment debtor's financial dealings, which would furnish *equal* protection to the judgment creditor." *Id.* (emphasis added). Only in "unusual circumstances" should a stay be permitted with only partial or no security, and then only if it will not "unduly endanger the judgment creditor's interest in ultimate recovery." *Federal Prescription Service, Inc. v. American Pharmaceutical Association*, 636 F.2d 755, 760-761 (D.C. Cir. 1980).

Appellant in this case fails to make any showing that a bond should be dispensed with entirely on this appeal. Indeed, the Olympic Committee will be left totally unprotected. Even a reduced bond, in light of appellant's dire financial straits, would seriously endanger the Olympic Committee's ability to collect later should it prevail on appeal. The mere fact that the appellant is a non-profit institution hardly requires the invocation of special considerations, particularly in light of the fact that its liability here was based on a finding of willfulness when it clearly sought to profit by trading on the Olympic Committee's goodwill. Granting a stay without any bond or other form of security, solely because the appellant has few assets, turns the

requirement of a bond to protect the judgment creditor's interests on its head. I would not stay judgment without a bond.

File Date: January 27, 1986

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Opinion issued January 27, 1986

The opinion of the Court of Appeals, affirming summary judgment and the injunction and reversing and remanding the attorneys' fees award, is reprinted as Appendix 1, pages 1-24, of the Petition for Certiorari.

File Date: May 22, 1986

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Order issued May 22, 1986

The Order denying rehearing and amending the opinion issued January 27, 1986, is reprinted as Appendix 2, pages 25-27, of the Petition for Certiorari.

File Date: May 28, 1986

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Opinion issued May 28, 1986

The opinion dissenting from denial of *en banc* review is reprinted as Appendix 3, pages 28-59, of the Petition for Certiorari.

Supreme Court, U.S.
FILED
JAN 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

(9)

No. 86-270

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

SAN FRANCISCO ARTS & ATHLETICS, INC.
and THOMAS F. WADDELL, M.D.,
Petitioners,

v.

UNITED STATES OLYMPIC COMMITTEE
and INTERNATIONAL OLYMPIC COMMITTEE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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JOINT APPENDIX III

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PETITION FOR CERTIORARI FILED AUGUST 19, 1986
CERTIORARI GRANTED OCTOBER 20, 1986

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[EXHIBIT A TO MILLER AFFIDAVIT]
[See *ante* p. 33]

[LOGO WITH 5 RINGS]
Olympic House:

UNITED STATES OLYMPIC COMMITTEE
1750 East Boulder Street,
Colorado Springs, Colorado 80909
Tel. (303) 622-5551 Telex 45 2424
Cable "AMOLYMPIC CSP"

IX Pan American Games,
Caracas, Venezuela,
August 20-September 3, 1983

XIV Olympic Winter Games,
Serejevo, Yugoslavia,
February 7-19, 1984

Games of the XXIII Olympiad,
Los Angeles, California, U.S.A.,
July 25-August 12, 1984

F. DON MILLER
Executive Director

Gay Olympic Games
P.O. Box 14874
San Francisco, CA 94114

December 23, 1981

To Whom It May Concern:

The United States Olympic Committee has become aware of your organization known as the Gay Olympic Games which is promoting a Gay Olympic Games function on August 28, 1982. We also understand that you have initiated a publication entitled "Gay Olympics" as well as various related activities and fund-raising events.

Please be advised that such activity and usage of the word "Olympic" with relationship to such activities is prohibited by Public Law 95-606, the Amateur Sports Act

of 1978, a copy of which is enclosed. The United States Olympic Committee has also long held trademark rights to the usage of the word "Olympic" with regard to such activities. No person or organization may use the word "Olympic" with respect to functions which are not sanctioned by the United States Olympic Committee, and this most particularly applies to any athletic competitions.

In addition, the United States Olympic Committee is entitled, according to its legal remedies, to recover any and all funds which are solicited and acquired by virtue of the usage of Olympic terminology with respect to athletic competitions in which the word "Olympic" is not sanctioned by the United States Olympic Committee.

While it is understandable that organizations such as yours may innocently use terminology which involves the use of the word "Olympic", the United States Olympic Committee takes exception to such usage. We must ask you to terminate immediately any reference to the word "Olympic" with respect to the activities which have been discussed herein and refrain from using such terminology in the future.

Please send your written acknowledgement of this request within ten (10) days of receipt of this letter. Thank you for your cooperation in this matter.

Sincerely,

F. DON MILLER

FDM/ghm
Enc.
CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Contributions Are Deductible for Income Tax Purposes

[EXHIBIT B TO MILLER AFFIDAVIT]
[See *ante* p. 33]

GAY OLYMPIC GAMES
P.O. Box 14874, San Francisco, California 94114, U.S.A.

Dec. 26, 1981

[THREE-RING LOGO]

Col. Don Miller
1750 East Boulder St.
Colorado Springs, Colo. 80909

Dear Col. Miller:

When we originally filed our articles of incorporation in Sacramento, Calif., we were told we could not use the name "Olympic" in our corporate name or logo. We thus became "San Francisco Arts and Athletics". We are sponsoring two events as described in the enclosed material.

We recently heard indirectly that we now could not even call our athletic contests the "Gay OLYMPIC Games", at least not without permission from the United State Olympic Committee.

I had a conversation with Mike Moran and explained that we were only aware of the word "Olympic" as a generic term, referring to an event that pre-dated Christ. I mentioned that we were also aware that there were "Armchair Olympics", "Special Olympics", "Handicapped Olympics", "Police Olympics" (being held in this same city next summer), even "Dog Olympics". There are also 33 listings in the San Francisco phone book using the term Olympic.

Col. Miller, these Games are very specialized indeed. Our outreach and emphasis differs widely from the traditional Olympic Games in that we, openly gay people around the world, are struggling to produce an image that more closely resembles the facts rather than some

lidibinous stereotype generated over decades of misunderstanding and intolerance. We need to demonstrate our similarities as fully vested citizens.

Some things are changing. Homosexuality is now not something that needs to be "understood", any more than ones tastes in food can be understood, it is simply something that needs to be accepted.

We feel strongly that the term "Olympic" is integral to what we intend to achieve. Our eight days of cultural events and sport will be a testament to our character and our wholesomeness; arts and athletics within the ancient Olympic format.

If permission, according to law, is a necessity; then we hereby apply for such, and assume that you will be fair in view of the precedents already set. We, in turn, will demonstrate our graditude in ample ways as the 1984 Olympic Games in Los Angeles draw closer.

Best wishes for 1982.

Respectfully yours,

/s/ Thomas Waddell
THOMAS F. WADDELL, M.D.
Chairman
San Francisco Arts and
Athletics

cc: Hon. Alan Cranston
Gov. Jerry Brown
Mayor Dianne Feinstein
Board of Supervisors, City of
San Francisco

[EXHIBIT C TO MILLER AFFIDAVIT]

[Exhibit A to Defendant's Responses to Requests for Admissions]

[See *ante* pp. 33, 219]

[Sketch of Three Runners Omitted in Printing]

GAY
OLYMPIC
GAMES

[THREE-RING LOGO]

Gay Olympic Games
P.O. Box 14874
San Francisco, CA
94114
415/861-8282

[THREE-RING LOGO]

THE GAY OLYMPIC GAMES
AN OVERVIEW

Why a GAY Olympic Games?

Gay men and women who live openly in society have created a viable sub-culture in cities throughout the world. Up until now it has been characterized by the traditional media as an exclusive sexual lifestyle. That may have been the basis of our liberation and the genesis of our sub-culture, but it is after all only a superficial inspection of the depth of our character. We, as gay persons aspire to many of the goals and activities of traditional society, including an active participation in organized sport. Here then, is an opportunity to expand our image and educate the general public on the vitality, variety, and versatility of the Gay community, through the promotion of sports events within the framework of Olympic style competition. It will also serve to unite our athletic organizations nationally and internationally, to say nothing of the joy of our own Olympics.

Who can compete?

There are no restrictions for competing in the Gay Olympic Games other than the requirements put forth by each Olympic Sport Committee for their individual sport. No one will be denied the opportunity on the basis of age, gender, color, creed, or sexual preference.

Representation is on a city basis. It is true that many gay men and women move to large urban centers and so we are permitting teams and individuals to compete for their city of origin regardless of where they are now living. This means that an athlete living in Houston may represent his/her home town in Lubbock if in fact he/she could not make the Houston team in that sport. A mail-

ing address in the city to be represented is the only requirement.

How do the athletes get to San Francisco?

Begin organizing teams now and develop a fund-raising campaign. Transportation to San Francisco is up to the participants. Once arrived, our Olympic Committee will host your stay with exception of meals (discount ticket for athletes will be issued). We are attempting to work out special group rates with EASTERN AIRLINES, which will also provide an information booth at San Francisco Airport (SFO).

What sports are planned?

All of the following sports have corresponding men's and women's events: track & field, basketball, volleyball, swimming, cycling, tennis, marathon, bowling, billiards, physique, powerlifting, soccer, and golf. For men only, there will be wrestling. For women only, there will be rugby.

How are the Games financed?

By local and national fundraising, registration fees, and donations.

Best wishes,

/s/ Tom Waddell
TOM WADDELL, Chairman
GOG Committee

GAY OLYMPIC GAMES

P.O. Box 14874 San Francisco, California 94114 U.S.A.

[THREE-RING LOGO]

PRESS RELEASE

Gay Olympic Games* San Francisco* 82

The Gay Olympic Games Organizing Committee in San Francisco is proud to announce the Gay Olympic Games,* San Francisco,* 82. Opening Day Ceremonies which will rival the traditional Olympic Games in pageantry will begin at 1 pm on August 28, 1982 at Kezar Stadium. The Games will end with Closing Ceremonies on September 5.

More than 27 countries will send over 4,000 gay men and women athletes to participate in the Games. Each team will march in uniform behind the flags of their respective cities. Except where noted, there will be corresponding events for men and women in 18 different sports. These are: BASKETBALL, BILLIARDS, BOWLING, BOXING (MEN), CYCLING, GOLF, MARATHON, PHYSIQUE, POWERLIFTING (WOMEN), RUGBY (WOMEN), SOCCER, SOFTBALL, SWIMMING AND DIVING, TENNIS, TRACK AND FIELD,

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* Enclosed is a sketch of the first Gay Olympic Games Poster. The original is in 3 colors and 14" x 22". There is a limited edition of 2,000 available for purchase ($4.00).

There is also a Games Package consisting of one tee shirt, one bumper sticker, and one button, all with the Games logo emblazoned. ($10.00)

Write to:

Gay Olympic Games
Box 14874
San Francisco, CA 94114
(415) 861-8282

VOLLEYBALL, WEIGHTLIFTING, AND WRESTLING (MEN).

The Games will take place in various facilities in the city over an 8 day period. Athletes will be housed in private homes and transportation will be provided to all competitive sites.

The Gay Olympic Committee will sponsor a simultaneous week of cultural activities which has been titled "The International Festival of Gay Artists". This event will consist of a city-wide festival of singing, music, dance, theater, art and film.

The entire week of athletic and cultural activities is the first of its kind in history. The athletic competition is best described as "serious fun" and though outstanding performances are expected in each sport, the major emphasis is on participation.

There will be an original Gay Olympic Anthem composed for the Games and an original Gay Olympic medal struck in gold, silver, and bronze for the top three place finishers in each event. A torch will be lighted at Stonewall in New York City and carried by runners cross-country to arrive at Kezar Stadium for the Opening Day Ceremonies.

We invite you to become involved in helping us to expand the image and character of gay men and women everywhere. The success of these Games can effectively help balance the false perspective often accorded to gay people. We participate in the same ideals as other citizens. We work hard for ourselves and for others. We need to demonstrate our similarities.

We are still seeking respect from others, but this is not something that automatically comes from merely being gay; history has taught us that often enough. Respect comes from performance and we are ready to perform.

Gay Olympic Games, San Francisco° 82 will make us all proud. Please help us make it possible. Help us get the word out! Thank you.

Yours truly,

/s/ Tom Waddell
THOMAS WADDELL, M.D.
Chairman
Gay Olympic Games

GAY OLYMPIC GAMES

[THREE-RING LOGO]

GAY OLYMPICS
NEWSLETTER

VOL. 1. NO. 2

DECEMBER, 1981

Opening Day Ceremonies

On August 28, 1982, at Kezar Stadium in San Francisco, at 1:00 pm, The Gay Olympic Games will officially begin. We are planning to make these ceremonies a celebration for gay men and women from all over the world and from hundreds of American cities. Kezar Stadium's 63,000 capacity sounds just right!

There will be a dias for our honored guests. We have invited all of the members of the San Francisco Board of Supervisors, Mayor Diane Feinstein, State Senator Milton Marks, and Speaker of the California Assembly, Willie L. Brown, Jr. We are anticipating that Mayor Feinstein will officially open the Gay Olympic Games. Supervisors Britt, Dolsen, Silver and Molinari have already accepted our invitation.

The athletes will march into the stadium behind their respective city flags and take their place on the field. There will be a Flag Corps consisting of 250-300 gay men and women who will perform flag routines with Chinese banners and flags. The field will be filled with color.

A runner will enter the stadium with the Gay Olympic Torch; said torch having been lit at Stonewall in New York City and run across the United States to San Francisco. The runner will proceed to the top of Kezar Stadium and officially light our Gay Olympic Flame. This will coincide with the very first performance of an original Gay Olympic Games Anthem composed by Alex Rasch.

There will be music from various performers. We will have the San Francisco Gay Marching Band there and are inviting bands from other cities.

Wally Rutherford has volunteered to produce the entire extravaganza. His wonderful talents should ensure a spectacular event. He will be working with Hydie Downard who is in charge of Opening Day Ceremonies. Please direct any help or suggestions to Hydie. P.O. Box 14874, S.F. 94114 or call The Olympic Office: (415) 861-8282.

• • • •

International Report

Thus far we have corresponded with individual athletes and teams from England, Holland, Germany, France, Ireland, Northern Ireland, Scotland, Wales, Italy, Lichtenstein, Sweden, Denmark, Finland, Brazil, Venezuela, Mexico, Argentina, Hong Kong, Japan, Australia and New Zealand.

A group of language students from the University of California at Berkeley have offered to translate our language into other languages and to act as interpreters when the overseas athletes arrive.

International (and national) contingents should begin planning their uniforms, both marching and competitive. We would like all cities to present their teams in matching uniforms for all the ceremonies and festivities. Competitive uniforms must conform to the requirements of each sport.

In our information package, due out in December, there will be questions regarding color and types of uniforms as well as a description of your City Flag. Only the name and emblem of your city will be permitted on any flags or uniforms. Please, no slogans, advertising or graffitti.

Here in San Francisco we are attempting to have our uniforms donated to our team members. Preliminary plans are to have the women's teams in white blazers, blue slacks, blue shoes and caps. The men's teams will

wear blue blazers. Both teams will have pale blue shirts. Each blazer will have the Olympic emblem over the left breast.

The big event is drawing near. Call or write to us for any details . . . Best wishes for the Holidays.

• • • •

Committee Heads

Basketball	*Glen Mercier*
Billiards	*Kitty Stevens (w)* *Gene Miller (m)*
Bowling	*Sara Lewenstein (w)* *Mel Garcia (m)*
Boxing	*Rick Meyers*
Cycling	*Brandy Moore* *Jerry Ford*
Golf	open
Marathon	*Bud Budlong*
Physique	*Jim Bridges*
Powerlifting	*Mitchel Tanner (w)*
Rugby	open (w)
Soccer	*Ken Bunch* *Josh Perskey*
Softball	*Mark Brown*
Swimming	*Jill Ramsay*
Tennis	*Bonnie Whythe (w)* *Les Balmain (m)*
Track & Field	*Toni Kaska (w)* *Tom Waddell (m)*
Volleyball	*Kathy Argo (w)* *Jim Bridges (m)*
Wrestling	*Robin Chambers (m)* *Don Jung*
Weightlifting	open (m)
Flag Corps	*Mel Garcia*

Housing	*Derrill Loberg*
Newsletter	*Brenda Young*
Volunteers	*David Warda*
Computer	*Robert Hawk*
Cultural Week	*Morgan Costin*

Opening Day Ceremonies
Hydie Downard
Telephone:
(415) 861-8282

Write:

Gay Olympic Headquarters
P.O. Box 14874
San Francisco CA 94114

Publicity

In the month of December, along with this issue of the Newsletter, a National Press Release was sent to 300 gay men and women publications and gay radio programs in the United States and Canada. Also, the first Olympic poster, advertising the games, has been sent to gay bars and organizations (men & women) across the United States and Canada.

Housing the Athletes

Four to five thousand athletes from twenty-eight different countries will arrive in San Francisco for the '82 Games. The Gay Olympic Games Housing Committee will be responsible for the accommodations of each of these athletes.

• • • •

Olympic T-Shirt Package

The T-Shirt Package includes an official Olympic T-Shirt (S, M, L, or XL), button and bumper sticker. The price is only $10.00 and includes postage and handling.

• • • •

FUNDRAISERS

Money is always needed to keep the flow of events happening—the newsletter, press releases, national poster advertising, office rental and many other day-to-day needs. We need your help. If you or any of your friends wish to hold a fundraiser or contribute in any way (no amount is too small), we, the Olympic Committee, would be most appreciative. Remember, the success of the Gay Olympic Games will benefit Gay people everywhere and will help to establish a close-knit world community. We must all participate in whatever way we can.

• • • •

Olympic Headquarters

Yes, we now have an office to work out of. It is located at:

597 Castro Street
(at 19th Street)
San Francisco
(415) 861-8282

Our mailing address remains the same:
Gay Olympic Games '82
P.O. Box 14874
San Francisco, CA 94114 USA

Flag Corps

The first practice session of the Olympic Flag Corps was held on Saturday, November 14th. Forty men and women showed up of which 10 were new signees. The Corps now has 100 members and still needs 200 more members to reach its goal of 300. The practice session was for two hours and basically marching was stressed. A good time was had by all and everyone is eager to get together again. Our next practice is January 12, at Kezar Pavilion (Stanyan and Waller Streets). Anyone interested in joining may do so between 7:30-8:00

pm, on Tuesday, January 12. Practice will start promptly at 8 pm, or call the Gay Olympic Headquarters (at 415-861-8282) for further information. The Corps will march in the Gay Freedom Day parade in June and perform at the opening ceremony of the Gay Olympic Games, Saturday, August 28, 1982, and the closing ceremony, Sunday, September 5, 1982. There is a large parking lot next to Kezar Pavilion that you may use to enter the building through the side door. Tennis shoes must be worn on the Pavilion floor.

Olympic Poster

The First Gay Olympic Games Poster is now available. This limited edition poster designed by *Robert '81* can be purchased at our office at 597 Castro Street. The initial introductory price is $4.00. For postage and mail handling, an additional $1.00 is required.

OFFICIAL PUBLICATION OF
SAN FRANCISCO ARTS &
ATHLETICS, INC.
BRENDA K. YOUNG, EDITOR
P.O. BOX 14874
SAN FRANCISCO, CA 94114

[EXHIBIT D TO MILLER AFFIDAVIT]
[See *ante* p. 34]

[United States Olympic Committee Letterhead]

January 6, 1982

Thomas F. Waddell, M.D.
Chairman
San Francisco Arts and Athletics
P.O. Box 14874
San Francisco, CA 94114

Re: *Gay Olympic Games*

Dear Mr. Waddell:

I am in receipt of your letter of December 26, 1981 regarding the "Gay Olympic Games." You should be advised that I have previously sent a letter to that organization indicating that the United States Olympic Committee takes exception to their usage of Olympic terminology with respect to the proposed activities. I am enclosing a copy of that letter for your information.

As that letter indicates, Public Law 95-606, a copy of which is enclosed, gives to the United States Olympic Committee the sole and exclusive right to make use of Olympic terminology in all respects, but most particuarly with respect to any athletic or purported athletic endeavor. We have also acquired trademark rights through federal registration with respect to the use of such terminology.

The position of the United States Olympic Committee with regard to the "Gay Olympic Games" has nothing to do with the issue of homosexuality. Rather, it has to do with the rights vested in the United States Olympic Committee through Public Law, trademark rights and the charge of the International Olympic Committee to protect

the usage of Olympic terminology in the best interests of the Olympic Games.

You have made mention of a number of "Olympic activities" and you should be advised that with respect to almost all Olympic activities and Olympic usage, the United States Olympic Committee takes exception and opposes such usage. There are a few exceptions. Public Law 95-606 charges the United States Olympic Committee with the responsibility of developing programs and participating in programs for the handicapped. In this respect we actively work with the handicapped to develop such programs, and therefore, do not take exception, and, in fact, have encouraged the development of special programs in this area.

The designation of "Olympic Games" by its very nature indicates an activity which occurs once every four years and involves athletic competition between the youth of the world. To allow your organization to make use of such terminology would dilute the meaning and significance of this event, and, I therefore cannot grant authorization for such usage.

Thank you for your inquiry in this matter.

Sincerely,

F. DON MILLER

FDM/ghm
Enc.

[EXHIBIT E TO MILLER AFFIDAVIT]

[See *ante* p. 34]

GAY ——— GAMES

P.O. Box 14874, San Francisco, California 94114, U.S.A.

Jan. 18, 1982

[THREE-RING LOGO]

Col. Don Miller, Director
United States Olympic Committee
1750 East Boulder Street
Colorado Springs, Colorado 80909

Dear Col. Miller:

As per your request and according to the letter of Public Law 95-606-Nov. 8, 1978, we have discontinued the use of the term "Olympic" to describe our event.

We have, as an interim measure, blocked out the term "Olympic" and in all subsequent printed materials will substitute the term "Athletic".

Best wishes for a successful campaign for the 1984 Olympic Games in Los Angeles.

Sincerely,

/s/ Tom Waddell
THOMAS F. WADDELL, M.D.
Chairman

[EXHIBIT F TO MILLER AFFIDAVIT]

[See *ante* p. 34]

[United States Olympic Committee Letterhead]

January 27, 1982

Thomas F. Waddell, M.D.
Chairman
Gay Athletic Games
P.O. Box 14874
San Francisco, CA 94114

Dear Tom:

I am in receipt of your letter indicating that the organization which you represent in San Francisco will not use the terminology, "Gay Olympic Games," and in its place will substitute the terminology, "Gay Athletic Games." I know that requests such as this one may present some difficulty to your organization, but I am sure that in the long run the activity will be as successful as the work that the organizers put into it.

I appreciate your response to my request and the position which you have taken, and I wish you well in your venture.

With all good wishes, I remain,

Sincerely,

/s/ Don
F. DON MILLER

FDM/ghm

[EXHIBIT G TO MILLER AFFIDAVIT]

[See *ante* p. 35]

Jan. 26, 1982

GAY ——— GAMES

[THREE-RING LOGO]

To: F. Don Miller, Director
UNITED STATES OLYMPIC COMMITTEE
1750 East Boulder Street
Colorado Springs, Colo. 80909

Dear Mr. Miller:

Greetings. Since I last wrote to you on January 18, 1982, on behalf of San Francisco Arts and Athletics, Inc. and the "Gay Olympics" of 1982, of which I am Chairman, I have been informed by legal counsel that it appears our organization *does* have a legal right to use the word "Olympic", in that (1) it *does not* appear that our nonprofit corporation has violated or is presently violating section 110(a) of Public Law 95-606, by its sponsorship and other activities in support of the "Gay Olympic Games" of 1982, because the use of the word "Olympic" in conjunction with this event *does not* tend to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the U.S. Olympic Corporation, Committee or any of their Olympic activities, and in that (2) it appears that the use of the term "Olympic" by our nonprofit corporation, its sponsors, members and others in conjunction with the "Gay Olympic Games", scheduled to be held in San Francisco, California, on August 28-September 5, 1982 is protected by the guarantees of free speech and association of the First Amendment, which expressly prohibits Congress from making any law(s) abridging those freedoms of the people of this nation.

I am also informed by legal counsel that it appears that the U.S. Olympic Committee is acting to discriminate against our nonprofit corporation, its supporters and others associated with the "Gay Olympic Games", by refusing to permit use of the term "Olympic" in this connection, and by your position stated in your letter of January 6, 1982 that "(T)o allow (our) organization to make use of such terminology would dilute the meaning and significance of (the U.S. Olympics and the World Olympics)." I am informed that such discrimination by yourself as Director of the U.S. Olympic Committee appears directly to violate the guarantee of equal protection of the laws of the U.S. Constitution, incorporated by the Fifth Amendment to govern conduct of our federal government and its delegates.

Until this controversy can be definitively resolved, we of San Francisco Arts and Athletics, Inc. are making every reasonable effort temporarily to suspend and avoid use of the term "Olympic" in our non-profit organization's activities to promote and plan the Games set for August 28-September 5, 1982. We are doing so *not* because we have doubts as to our organization's right to use the term "Olympic", but rather to provide a brief "moratorium" period in this controversy to facilitate informal resolution between these organizations, if possible. Practically speaking, however, this temporary avoidance of the use of the term "Olympic" in conjunction with the "Gay Olympic Games" is causing our organization demonstrable injuries, including but not limited to an inability to distribute literature and other items, to fully promote the "Gay Olympic Games" and so forth. Constitutionally more significant, our temporary non-use of the term "Olympic" exacts a direct daily and immeasurable cost in terms of the First Amendment freedoms of speech and association of those persons involved in our organization and in the "Gay Olympic Games".

A definitive resolution of this controversy about our use of the term "Olympic" is *urgently needed* by us. Any

resolution that precludes our use of the term "Olympic" will aggravate the injuries described above. I respectfully ask you to take all necessary action to assure permission of our organization to use the term "Olympic" in conjunction with the "Gay Olympic Games" of 1982, and to assure us that no legal action by the U.S. Olympic Corporation, its Committee or any agent thereof will be taken against us for our non-profit and constitutionally protected use of the term "Olympic" in this connection.

I am informed by legal counsel that *if* this controversy cannot be promptly resolved, on an amicable basis, between the concerned organizations, and to clarify our legal status and prevent further constitutional harms, our organization is advised to seek formal resolution of this controversy by the filing and expedition of a federal civil action seeking all necessary declaratory, injunctive and other relief to finally resolve this controversy, and to protect and implement the statutory and constitutional rights of San Francisco Arts and Athletics, Inc., participants in and contributors and sponsors of the "Gay Olympic Games" and all other affected persons. The governing body of our corporation by resolution has authorized all litigation necessary to such resolution.

In the belief that an amicable resolution of this controversy is preferable, especially to advance the rapport and respect that should exist between the persons and groups involved, and without in any way intending to foreclose any formal legal recourse that may prove necessary, I will await your written response to this letter, which I will expect to receive not later than 5 o'clock p.m. on Monday, February 1, 1982, at; P.O. Box 14874, San Francisco, California, 94114.

In formulating your response to this letter, I respectfully urge you to consider (1.) that the term "Olympic" is a generic one, of deep historic origin, that belongs to *all* people and that is widely used by many and diverse groups of people, to identify and celebrate a variety of

activities; (2.) that San Francisco Arts and Athletics, Inc.'s use of the term "Olympic" cannot fairly and accurately be characterized as violating the purposes or terms of Section 110 of Public Law 95-606, and that your conclusion to the contrary in your letter of December 23, 1981, "To Whom It May Concern", is factually incorrect and legally unsupported; (3.) that the position of our corporation in conjunction with the "Gay Olympic Games" of 1982 is closely analogous to that of the plaintiff in *S.T.O.P. v. U.S. Olympic Committee*, Civil Action # 4691 (D.N.Y.), decided in favor of S.T.O.P. by U.S. District Judge John Canella on February 5, 1980; (4.) that our use of the term "Olympic" is non-commercial, and that our organization is operated on a non-profit basis.

I will look forward to receipt of your written response to this letter, indicating whether the U.S. Olympic Committee agrees, upon review of your earlier statements and conclusions in light of the facts and reasons set forth in this letter, that San Francisco Arts and Athletics, Inc.'s activities in conjunction with the "Gay Olympic Games" of 1982 are *not* in violation of section 110 of Public Law 95-606, and that our organization is permitted to use the term "Olympic" in those activities, as a matter of constitutional right, safeguarded in the guarantees of free speech and association of the First Amendment to the U.S. Constitution.

The name and address of legal counsel providing the advice and opinions that I have described above, to our organization, is Mary C. Dunlap, 425 Staples Avenue, San Francisco, CA 94112.

Sincerely,

/s/ Thomas F. Waddell, M.D.
THOMAS F. WADDELL, M.D.
Chairman

[EXHIBIT H TO MILLER AFFIDAVIT]

[See *ante* p. 35]

[United States Olympic Committee Letterhead]

February 2, 1982

Thomas F. Waddell, M.D.
San Francisco Arts and Athletics, Inc.
P. O. Box 14874
San Francisco, California 94114

Re: *Our File No. 29642/00405*

Dear Dr. Waddell:

Your letter of January 26, 1982 was not delivered to the United States Olympic Committee until last Friday afternoon, January 29, when it was referred to me for response.

In this letter you ask the United States Olympic Commitee to authorize the San Francisco Arts and Athletics, Inc. to use "Gay Olympic Games" for an international athletic event which it intends to sponsor in 1982. As legal counsel for the United States Olympic Committee I am disturbed by your apparent repudiation of your prior agreement resolving this matter. That agreement provided that your organization would discontinue "the use of the term 'Olympic' to describe our event", in consideration of the Olympic Committee forebearing to bring legal action to enforce its rights, as confirmed by the Executive Director on December 23, 1981 and your acknowledgement of January 18, 1982.

Please be advised that the United States Olympic Committee intends to abide by this agreement, as evidenced by our response of January 27, 1982. Accord-

ingly, we must insist that San Francisco Arts and Athletics, Inc. also adhere to this agreement.

Sincerely,

/s/ RICHARD G. KLINE

RGK:jlm

cc: Ms. Mary C. Dunlap
United States Olympic Committee

[EXHIBIT C TO KLINE DECLARATION]

[See *ante* p. 30]

MARY C. DUNLAP

Attorney at Law
(415) 587-8320

425 Staples Avenue
San Francisco, Ca 94112

12 February 1982

To: RICHARD G. KLINE
Counselor
1819 H Street N.W.
Washington D.C. 20006

Re: San Francisco Arts & Athletics Inc.'s "Gay Olympic Games"

Dear Mr. Kline,

Greetings. I am legal counsel to San Francisco Arts & Athletics Inc. (below "SFA&A"), which is a non-profit corporation chartered in California, in the above-identified matter. I have read and considered your letter of February 2, 1982, to Dr. Thomas Waddell, and I must take serious issue with its contents.

There is *no* agreement, and there has at no prior time been any agreement, between my client (nor any representative or officer of my client) and U.S.O.C. (nor any representative of U.S.O.C.) for my client to discontinue use of the term "Olympic" in consideration for U.S.O.C.'s forebearing litigation against my client. Dr. Waddell's letter to Colonel Miller dated January 18, 1982 was written prior to Dr. Waddell's receipt of legal advice indicating to him and to others affected that (1.) it is very doubtful that SFA&A would be found to be violating Public Law 95-606, or any section thereof, in its terms and in light of Congress' intent in its enactment, and (2.) there are gross abridgements of the First Amend-

ment's guarantees of free speech and association to SFA&A's officers, members, and others involved in the "Gay Olympic Games", in the legal posture of U.S.O.C. that SFA&A and those associated with SFA&A may not use the word "Olympic", and (3.) it appears that U.S.O.C. and Colonel Miller and others, under color of federal law, have discriminated against and threaten to continue to discriminate against SFA&A in violation of the Fifth Amendment's guarantee of equal protection of the laws, by their treatment of SFA&A and Dr. Waddell and others associated with the "Gay Olympic Games", vis à vis the treatment accorded to other similarly situated individuals and groups. Moreover, as the letter from Dr. Waddell expressly recites, deletion of the word "Olympic" was an "interim measure", subject to legal advice being received from myself and others indicating that the U.S.O.C.'s "proclamation", that SFA&A was in violation of Public Law 95-606, appeared to be incorrect, and constitutionally ill-considered.

Dr. Waddell could not possibly have intended to "agree" to waive rights of his organization under Public Law 95-606, nor was he empowered to waive anyone's constitutional rights (there is no such thing!) when he sent the letter of January 18th, because he was unaware of the extent and meaning of those rights and of the primacy of the First Amendment in this situation, and because he had been affirmatively misinformed and threatened by the letters from Colonel Miller, containing categorical and unmeasured pronouncements as to the unlawfulness of SFA&A's use of the term "Olympic". Moreover, the letter of Dr. Waddell of January 18th does not mention nor imply that the statements made therein are offered in consideration of any foregoing of suit by U.S.O.C. Thus, there can be *no* agreement of the sort that you conjure in your letter to Dr. Waddell on February 2, 1982.

My client and its representatives continue to desire an amicable, out-of-court resolution of this controversy, if feasible. My client and its representatives, officers and others concerned do not intend to abandon their rights to use the term "Olympic", however. All SFA&A materials and properties containing the word "Olympic" could be asterisked * and labeled "not associated with the U.S. Olympic Committee" if your client desires; my client makes this proposal to accommodate, without any admission nor intent to admit any violation of any law, nor specifically to admit any confusing similarity. If your client finds this accommodation satisfactory, in terms of any claim that your client purports to have against my client, be so kind as to inform me of this fact by letter at your earliest opportunity. If this proposed accommodation is not satisfactory to your client, likewise please inform me of that fact in writing so that my client and I may take all necessary steps to protect the rights of those associated with SFA&A to hold and sponsor the "Gay Olympic Games of 1982", and to speak and associate freely in relation thereto, as assured to them by the Constitution of the United States, Amends. I and V. Thank you.

Best regards,

/s/ Mary C. Dunlap
MARY C. DUNLAP
Attorney for San Francisco
Arts & Athletics Inc.

[EXHIBIT D TO KLINE AFFIDAVIT]

[See *ante* p. 31]

[United States Olympic Committee letterhead]

February 22, 1982

Ms. Mary C. Dunlap
420 Staples Avenue
San Francisco, California 94112

Re: Gay Olympic Games
Our File No. 92642/00405

Dear Ms. Dunlap:

Your letter of February 12, 1982 contained several misconceptions regarding the enforceability of the agreement entered into between the United States Olympic Committee and Dr. Waddell on behalf of San Francisco Arts and Athletics, Inc.

First, I am not aware of any authority which holds, or even intimates, that a party is required to receive approval of an attorney before entering into a binding agreement, and I seriously doubt whether such an argument would be favorably considered by any court.

Second, the relative merits of a controversy are irrelevant once there has been an agreement which is predicated on a forbearance of action. For example, the United States Court of Appeals for the District of Columbia held in *Autera v. Robinson*, 419 F.2d 1197 at 1201 (D.C. Cir. 1969):

> "Of course, a valid settlement agreement, once reached, cannot be repudiated by the parties, and after a binding settlement agreement has been made, the actual merits of the settled controversy are without consequence."

Third, the U.S.O.C., United States Olympic Committee, although federally chartered, is not a federal agency within the meaning of the First or Fifth Amendments to the Constitution of the United States which was specifically addressed in *De Frantz v. United States Olympic Committee*, 492 F. Supp. 1181, 1194 (D.C.C. 1980). Consequently, the constitutional issues raised in this regard also are irrelevant.

Fourth, assertion of a federal statute can hardly be considered violative of public policy.

Finally, the only "interim measure" referred to by Dr. Waddell is the physical blocking out of the word "Olympic" on your client's stationery and other paraphernalia, in order to effectuate the agreement immediately and to minimize the impact on its activities. This reference followed an express and unqualified undertaking by your client on January 18, 1982 and "we have discontinued the use of the term 'Olympic' to describe our event."

The United States Olympic Committee considers that the issue of the use by your client of the term "Olympic" in connection with its proposed athletic games has been amicably resolved. Your offer to modify the pre-existing agreement to include a disclaimer is unacceptable.

Very truly yours,

RICHARD G. KLINE

RG:jlm

cc: United States Olympic Committee

[EXHIBIT I TO KINE DECLARATION]

[See *ante* p. 31]

UNITED STATES PATENT OFFICE

789,795
Registered May 18, 1965

PRINCIPAL REGISTER
Service Mark

Ser No 192536, filed May 1, 1964

OLYMPIC

United States Olympic Association (United States non-profit corporation), doing business as the United States Olympic Committee
57 Park Ave.
New York, N.Y.

For: SERVICES PROMOTING, PUBLICIZING, AND CONTROLLING THE PARTICIPATION OF THE UNITED STATES IN THE OLYMPIC AND PAN AMERICAN GAMES; REPRESENTING THE UNITED STATES BY SELECTING AND OBTAINING THE MOST COMPETENT AMATEUR REPRESENTATION FOR COMPETITIONS AND EVENTS OF THE OLYMPIC AND PAN AMERICAN GAMES; AND ORGANIZING THE OLYMPIC AND PAN AMERICAN GAMES WHEN CELEBRATED IN THE UNITED STATES, in CLASS 107.

First use 1896; in commerce 1896.

REGISTERED FOR A TERM OF 20 YEARS FROM May 18, 1965.

COMB. AFF. SEC 8 & 15

Certified to be a true copy of the registration, which is in full force and effect, with notations of all effective actions taken thereon, excluding transfers, as disclosed by the records of the United States Patent & Trademark Office.

/s/ [Illegible]
Commissioner of Patents
and Trademarks

[SEAL]

Attest:

Feb. 25, 1982
C. R. Hill,
Attesting Officer.

UNITED STATES PATENT OFFICE

968,566
Registered Sept. 18, 1973

PRINCIPAL REGISTER
Trademark
Service Mark
Collective Membership Mark

Ser. No. 381,518, filed Jan. 21, 1971

OLYMPIC

United States Olympic Committee (United States non-profit corporation)
57 Park Ave.
New York, N.Y. 10016

For: APPARATUS SOLD AS A UNIT FOR PLAYING A BOARD OR SIMILAR TYPE PARLOR GAME; EDUCATIONAL TOYS; REGULAR AND WARMUP UNIFORMS USED IN CONNECTION WITH TRACK AND FIELD GAMES; HELMETS; AND TRACK SHOES, in CLASS 22 (INT. CL. 28).

First use at least as early as 1960; in commerce since at least 1960.

For: JEWELRY, TIE CLIPS, LAPEL PINS, CUFF LINKS, MONEY CLIPS, CHARMS, MADE IN PART OF PRECIOUS AND SEMI-PRECIOUS METAL-WARE, in CLASS 28 (INT. CL. 14).

First use at least as early as 1932; in commerce since at least 1932.

For: GLASSWARE — NAMELY, TUMBLERS, BOWLS AND DISHES—in CLASS 33 (INT. CL. 21).

First use at least as early as 1964; in commerce since at least 1964.

For: WRITING PAPER, STATIONERY, NAPKINS AND SHEET PAPER, in CLASS 37 (INT. CL. 16).

First use at least as early as 1948; in commerce since at least 1948.

For: PRINTS AND PUBLICATIONS, INCLUDING PAMPHLETS, BOOKS, MANUALS, NEWSLETTERS, BROCHURES, PROGRAMS AND FILMS, in CLASS 38 (INT. CL. 16).

First use at least as early as 1948; in commerce since at least 1948.

For: SOUVENIRS, PINS, TROPHIES, PLAQUES, MEDALLIONS, MEDALS, BANNERS, PATCHES AND EMBLEMS, in CLASS 50 (INT. CLS. 14, 20, 24, and 26).

First use at least as early as 1932; in commerce since at least 1932.

For: ADVERTISEMENTS TO RAISE MONEY TO SUPPORT THE OLYMPIC GAMES, in CLASS 101 (INT. CL. 35).

First use at least as early as 1920; in commerce since at least 1920.

For: INDICATING MEMBERSHIP IN APPLICANT, in CLASS 200.

First use at least as early as 1932; in commerce since at least 1932.

Owner of Reg. No. 789,795.

REGISTERED FOR A TERM OF 20 YEARS FROM Sept. 18, 1973.

Affd. Sec. 8 Accpt.

[SEAL]

Certified to be a true copy of the registration, which is in full force and effect, with notations of all effective actions taken thereon, excluding transfers, as disclosed by the records of the United States Patent & Trademark Office.

/s/ [Illegible]
Commissioner of Patents
and Trademarks

Attest:

Feb. 25, 1982
C. R. HILL

**[EXHIBIT J TO
KLINE SUPPLEMENTAL DECLARATION]**

[See *ante* p. 57]

[SEAL]

U.S. DEPARTMENT OF COMMERCE
Patent and Trademark Office

Address: Commissioner of Patents and Trademarks
Washington, D.C. 20231

Opposition No. 62,426

United States Olympic
Committee

v.

Golden Age Olympics, Inc.

MAILED
JUN 04 1981
PAT. & T.M. OFFICE

The parties have filed, on May 13, 1981, a stipulation to enter judgment against applicant herein. The stipulation is approved and judgment is hereby entered against applicant. The opposition is sustained and registration to applicant is refused.

/s/ S. Lefkowitz
S. LEFKOWITZ

/s/ D. J. Kera
D. J. KERA
Members, Trademark
Trial and Appeal Board

/s/ G. D. Krugman
G. D. KRUGMAN
Acting Member, Trademark
Trial and Appeal Board

cc:

Richard G. Kline
Beveridge, DeGrandi, Kline & Lunsford
1100 Federal Bar Building West
1819 H Street, N.W.
Washington, D.C. 20006

Franklin C. Whigham
200 West First Street
Sanford, Florida 32771

SETTLEMENT AGREEMENT

THIS AGREEMENT executed in duplicate on the respective dates of acceptance by and between the UNITED STATES OLYMPIC COMMITTEE, a non-profit United States corporation, located at 1750 East Boulder Street, Colorado Springs, Colorado 80909 (referred to herein as "Olympic Committee") and GOLDEN AGE OLYMPICS, INC., A Florida corporation, located at 400 East First Street, Sanford, Florida 32771 (referred to herein as "Golden Age").

WHEREAS, Golden Age filed Application Serial No. 160,792 in the United States Patent and Trademark Office on March 3, 1978 to register "GOLDEN AGE OLYMPICS" with an associated design representative of father time as a service mark in connection with conducting athletic contests for senior citizens (referred to herein as the "opposed mark");

WHEREAS, the Olympic Committee has objected to any use of the word "OLYMPICS" by Golden Age in its trade name or as a component of any mark, including registration of the opposed mark, which the Olympic Committee has challenged in Opposition No. 62,426 that presently is pending before the Trademark Trial and Appeal Board of the United States Patent and Trademark Office; and,

WHEREAS, Golden Age has agreed to permanently discontinue use of "OLYMPICS" in its trade name or as a component of any mark as well as consent to entry of judgment in Opposition No. 62,426 to prevent registration of the opposed mark.

NOW, THEREFORE, in consideration of Golden Age consenting to entry of a Final Judgment in Opposition No. 62,426 refusing registration of the opposed mark and commitment by Golden Age to immediately discontinue and permanently refrain from using or registering any

trade name or mark containing the word "OLYMPICS" or any derivative thereof in connection with promoting or conducting athletic contests for senior citizens, the Olympic Committee releases Golden Age from any existing liability or claim relating to the use of the word "OLYMPICS" in its trade name and as a component of the opposed mark with the understanding that in the event Golden Age fails to fully comply with this commitment in any respect, the Olympic Committee may apply to any United States District Court where a violation or threatened violation of this Settlement Agreement occurs or is about to occur to seek an injunction or other preventive remedy to secure compliance or prevent any threatened violation thereof, and, if requested, Golden Age agrees to consent to and enter no objection to the granting of such injunction or other preventive remedy, nor contest venue or jurisdiction of the court in which such relief is sought, as well as to pay all costs and expenditures incurred to enforce any provision of this Settlement Agreement, if Golden Age is found to have violated or threatened violation of the Settlement Agreement.

This Settlement Agreement shall be binding on the undersigned parties, as well as their related companies, constituent organizations, successors, assigns and representatives upon execution by both parties, and the signatures of the undersigned representatives shall constitute a warranty that they have the authority to enter into this Settlement Agreement and bind the party being represented.

GOLDEN AGE OLYMPICS, INC.

By /s/ John C. Stoner
Title—Executive Manager

ATTEST:

/s/ Virginia M. Longwell
Dated November 6, 1980

[CORPORATE SEAL]

UNITED STATES OLYMPIC
COMMITTEE

By /s/ F. Don Miller
Title—Executive Director

ATTEST:

/s/ Louie J. Perry
Dated 12-15-80

[CORPORATE SEAL]

**[EXHIBIT K TO
KLINE SUPPLEMENTAL DECLARATION]**

[See *ante* p. 58]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action File No. 80-2062

UNITED STATES OLYMPIC COMMITTEE
(a federally chartered corporation)
1750 East Boulder Street
Colorado Springs, Colorado 80909
(303) 632-5551

Plaintiff,

vs.

OLYMPIC TRAILS BUS COMPANY, INC.
50 South 20th Street
Irvington, New Jersey 07111
(201) 374-2197

Defendant.

CONSENT JUDGMENT
AND
PERMANENT INJUNCTION

It appearing to this Court that the parties have resolved their respective differences and entry of this judgment shall constitute a full and complete adjudication of this action to which the parties have indicated their consent and it is, therefore, Ordered, Adjudged, and Decreed that:

(1) Olympic Trails Bus Company, Inc., and its successors and assigns, as well as each of its officers, agents,

servants, employees, and all other persons in active concert or participation with them are hereby permanently enjoined from

(a) Using or displaying "OLYMPIC" after January 1, 1982, as a trademark, service mark or trade name and from using or displaying any word, name, symbol, device or combination thereof confusingly similar to "OLYMPIC" (except "Olympia Trails"), including without limitation those terms which

1. are the phonetic, foreign or legal equivalent of "OLYMPIC," or

2. incorporate the letters O-L-Y-M-P-I-C or any colorable imitation thereof (except "Olympia Trails") as a component thereof.

(b) Using or displaying the Olympic interlocking rings symbol or any other plurality of circles or rings whether interlocked or otherwise after January 1, 1982, either separately or in association with any trademark, service mark, trade name, word, name, symbol, or device except that three (3) non-interlocking rings may be used on the specific buses identified in the Appendix hereto until June 1, 1983.

(c) Using or displaying the Olympic interlocking rings symbol or any other plurality of circles or rings whether interlocked or otherwise, either separately or in association with any trademark, trade name, service mark, word, name, symbol or device in connection with any promotional purposes or on any vehicle not owned or operated by Olympic Trails Bus Company, Inc., as of the date of entry of this judgment.

(2) Within thirty (30) days of the signing of this agreement Olympic Trails Bus Company, Inc., agrees to file with all appropriate state and federal agencies all necessary papers respecting the name change required by this decree. Olympic Trails Bus Company, Inc., shall pro-

ceed with reasonable diligence to quickly bring the name change required by this agreement into full fruition when the required approvals of state and federal authorities are received, but in no event later than January 1, 1982.

(3) (a) Within thirty (30) days of the signing of this agreement, Olympic Trails Bus Company, Inc., shall file with the Court a statement setting forth the steps which have been taken to comply with this decree.

(b) When this decree has been fully complied with, but in any event prior to June 1, 1983, Olympic Trails Bus Company, Inc., shall file with the Court a statement signed by an officer of the corporation setting forth the steps which have been taken to comply with this decree.

(4) Olympic Trails Bus Company, Inc., its successors, assigns and officers have the consent of the United States Olympic Committee to utilize "OLYMPIA TRAILS" as as trade name, or part thereof in connection with ground transportation and tours which include ground transportation, so long as such name is not used in conjunction with any circles or rings, shields or escutcheons, torches, or any other word, name, symbol or device tending to cause confusion, to cause mistake, or deceive, or to falsely suggest a connection with the United States Olympic Committee or any other Olympic activity.

(5) Except as expressly provided herein, the complaint and all claims and counterclaims in this action are dismissed with prejudice.

(6) Each party shall bear its own costs and attorney's fees.

ENTERED and issued this 25th day of February, 1981.

/s/ Oliver Gasch
United States District Judge

AGREED

/s/ Richard G. Kline
RICHARD G. KLINE
JOSEPH D. LEWIS
Beveridge, DeGrandi, Kline & Lunsford
1819 H Street, N.W.
Washington, D.C. 20006
(202) 659-2811
Attorneys for Plaintiff

AGREED

/s/ Eric Meierhoefer
ERIC MEIERHOFER
JOSEPH L. STEINFELD, JR.
1511 K Street, N.W.—Suite 423
Washington, D.C. 20005
(202) 347-9332
Attorneys for Defendant

* * * *

**[EXHIBIT L TO
KLINE SUPPLEMENTAL DECLARATION]**

[See *ante* p. 58]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-496

NATIONAL AMATEUR SPORTS FOUNDATION,
Plaintiff,

v.

UNITED STATES OLYMPIC COMMITTEE,
Defendant.

CONSENT DECREE

It appearing to this Court that the Parties have resolved their respective differences and entry of this decree shall constitute a full and complete adjudication of this action to which the parties have indicated their consent and it is, therefore, Ordered, Adjudged and Decreed that:

(1) NASF is not currently and shall not use "OLYMPIC" in connection with the solicitation of funds or obtaining contributions.

(2) NASF is not currently and shall not make any statement or representation tending to cause others to believe that Plaintiff is in any way connected with USOC or any Olympic activity.

(3) NASF is not currently and shall not use in connection with any services "OLYMPIC" or any colorable imitation, simulation or designation confusingly similar

thereto or symbolic therewith, in any manner which suggests or implies association, affiliation or connection with the United States Olympic Committee or any Olympic activity.

(4) USOC shall send informative communications to all state attornies general and any other officials it has previously contacted, including the United States Postal Service, concerning the activities of NASF, which communications may be in the form of a copy of this Consent Decree, the purpose of which is to advise said individuals that the differences between the two parties have been resolved.

(5) NASF shall provide to the USOC an Accounting, prepared by a Certified Public Accountant, of all contributions received as a result of direct mail campaigns by NASF which included distribution of an Olympic Sports Survey. In the event this Accounting demonstrates that contributions exceeded the costs incurred in the direct mail campaign, the difference shall be contributed by NASF to the USOC, but, if the costs exceeded the contributions received in response thereto, USOC agrees not to make any efforts to recapture or recover the same.

(6) This action is dismissed with prejudice and each party shall bear its own costs and legal fees in connection herewith.

Dated: 3-21-80

/s/ Thomas A. Flannery
United States District Court
Judge

AGREED

/s/ Robert R. Sparks, Jr.
ROBERT R. SPARKS, JR.
MICHAEL D. HUGHES
SEDAM & HERGE
7600 Old Springhouse Road
McClean, Virginia 22102
(703) 821-1000
Counsel for Plaintiff

AGREED

/s/ Richard G. Kline
RICHARD G. KLINE
Beveridge, DeGrandi, Kline & Lunsford
Federal Bar Building West
18 H. Street, N.W.
Washington, D.C. 20006
Counsel for Defendant

**[EXHIBIT M TO
KLINE SUPPLEMENTAL DECLARATION]**

[See *ante* p. 58]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1-82-596

UNITED STATES OLYMPIC COMMITTEE
Plaintiff

vs.

DAVID SHOE COMPANY, INC., *et al.*,
Defendants

OPINION AND ORDER GRANTING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

SPIEGEL, J.:

This matter came before the Court upon the complaint of the plaintiff, alleging violation of the Olympic symbol, trademark infringement and unfair competition (doc. 1), Plaintiff's Motion for Preliminary Injunction with memorandum attached (doc. 2) and Affidavits of Fact in support of said motion made by plaintiff's general counsel and by the president of the company with the exclusive right to market the products in issue. Due notice was given to defendant, Sol Weisenberg, president of defendant corporation, and he was present at the hearing with his attorney. The Court having heard testimony of witnesses for both parties, the arguments of counsel and having assessed the credibility of the witnesses, finds that

a preliminary injunction should issue and makes the following findings in respect thereto:

1. This Court has jurisdiction over the parties and subject matter of this action under the Trademark Laws of the United States, 15 U.S.C. § 1121, the Olympic Symbol protection statute, 36 U.S.C. § 380 and by virtue of 28 U.S.C. §§ 1331, 1337 and 1338.

2. Plaintiff United States Olympic Committee (USOC) is the registered owner of the Trademarks and Service Marks designated in plaintiff's Exhibits 1 through 4. These include the mark "Olympic", ("Olympics"), the Olympic symbol consisting of five interlocking rings displayed in various forms both alone and with the abbreviation "USA" and the symbol of the United States Olympic Committee that also contains the Olympic symbol of interlocking rings.

3. Plaintiff USOC has entered into an exclusive licensing agreement with MCF Footwear, Inc. (MCF) for the use of the marks "Olympic" and "Olympics" and the Olympic symbol of interlocking rings on athletic shoes. Sanshoe Trading Company, Inc. (Sanshoe) has, in turn, been oppointed by MCF as the exclusive marketer of such licensed footwear. Sanshoe has contracted with J.C. Penney Company, Inc. (J.C. Penney) as the exclusive customer and reseller at retail of shoes bearing the mark "USA Olympics" and the Olympic symbol of interlocking rings.

4. Defendants purchased 73,000 pairs of shoes bearing plaintiff's Trademarks and Service Marks from the TAEHWA Company in Korea. These shoes were manufactured for Sanshoe and then rejected by Sanshoe because they were defective in their design or performance.

5. Defendants were not authorized by plaintiff or anyone in privity with plaintiff to use or sell goods bearing plaintiff's Trademark and/or Service Mark.

6. The shoes are presently in a warehouse under bond to the United States Customs Service and defendants have not yet paid any import duty on the shoes.

7. The United States Customs Service issued a Notice of Redelivery to defendants on June 8, 1982 with regard to the 73,000 pairs of shoes. The Notice states, "The above described athletic footwear that is subject to Trademark and Copy-Right restriction is to be redelivered to U.S. Customs custody within thirty days from date of this notice."

8. Defendants will attempt to sell said shoes bearing plaintiff's Trademarks and Service Marks if the United States Customs Service releases them to defendants upon payment of duty.

9. The threat of irreparable harm to plaintiff, both economically and with regard to its reputation and status, is real if defendants attempt to sell or sells the shoes bearing plaintiff's Trademarks and Service Marks.

10. Plaintiff has no adequate remedy at law.

11. Plaintiff has standing to maintain this action as owner of the Trademarks and Service Marks in question. *J.C. Penney Co., Inc. v. Parrish*, 339 F. Supp.. 726 (D. Idaho 1972).

12. Under the authority of 36 U.S.C. § 380 and 15 U.S.C. § 1121, plaintiff is entitled to injunctive relief.

13. It is hereby ORDERED, therefore, that defendants are temporarily restrained and enjoined:

A. From using or causing to be used in any form whatever, for the purpose of trade or for any other purpose, the marks OLYMPIC, OLYMPICS or the Olympic symbol of interlocking rings or any colorable imitation or simulation thereof, either alone or in association with the "USA" abbreviation;

B. From making any statement or representation tending to cause others to believe that defendants are in any way connected with plaintiff or with any Olympic activity; and

C. From distributing, selling or in any manner whatsoever conveying any goods in their possession, including shoes, which contain the marks OLYMPIC, OLYMPICS or the Olympic symbol of interlocking rings or any colorable imitation or simulation thereof, either alone or in association with the "USA" abbreviation.

until further order of this Court.

SO ORDERED.

/s/ S. Arthur Spiegel
S. ARTHUR SPIEGEL
United States District Judge

[EXHIBIT B TO WALKER DECLARATION]

[See *ante* pp. 98, 219]

• • • •

[Figure of Woman Speaking and Bottle of Rumpleminze Peppermint Schnapps. Woman is saying]:

Rumpleminze donated $1000 to the Gay Olympic Games

• • • •

100 PROOF. IMPORTED FROM GERMANY.
ENJOY IN MODERATION.

• • • •

[EXHIBIT H TO WADDELL DECLARATION]

[See *ante* pp. 98, 219]

[THREE-RING LOGO]

GAY OLYMPIC GAMES
P.O. Box 14874
San Francisco, California
U.S.A.

Dear Prospective Supporter:

I would like to take a few minutes of your time and explain something that will begin in the City of San Francisco on August 28, 1982. It is an event that will have a great deal of impact on the public image of gay men and women, not only in the United States, but throughout the world.

The event is the Gay Olympic Games! Never before, in the history of gay people has there been such an international gathering for such a positive purpose. We expect as many as 4,000 athletes from American cities and more than 20 foreign countries to participate. These athletes will compete in the following sports: basketball; scoccer; weightlifting,; bowling; marathon; track & field; billards; swimming; volleyball; cycling; physique; wrestling; tennis; golf; rugby; softball. All of the sports are for both men and women with the exception of wrestling for men only and rugby for women only.

This event is becoming an important opportunity for gay men and women all over the world to demonstrate that our character has a wide and varied range. It is an opportunity to expand beyond a falsely tainted image. It is an opportunity to show that gay men and women, like all other responsible citizens of the United States participate in the same ideal. We invite you to become involved in our endeavor to expand upon our image. Your help will

enable us to present to the world a serious sporting event from which more respect for gay people will grow. The success of these Gay Olympic Games can effectively help balance the onslaught of the Moral Majority's perspective.

• • • •

The Gay Olympic Committee needs your help. We may, in the future, be able to solicit funds in the same way as the traditional United States Olympic Committee, but that opportunity is not yet available to us. We are depending on your contribution to make these Games a positive and historical reality for gay men and women.

• • • •

We are all volunteers on the Gay Olympic Committee, and there are no salaries. With less than one year to go, we need to escalate our outreach and prepare massive amounts of material and facilities. We particularly need to make gay people in other countries aware of the events (20 foreign cities have confirmed so far. We want many more).

• • • •

Gay Olympic Games '82 will be an event to make us all proud. Please help us make it possible. Thank you.

Yours truly,

/s/ Tom Waddell
THOMAS F. WADDELL, M.D.
Chairman
Gay Olympic Committee

[EXHIBIT A TO WADDELL DECLARATION]

[See *ante* pp. 98, 219]

GAY OLYMPIC GAMES
P.O. Box 14874
San Francisco, CA 94114

September 11, 1981

Dear Prospective Supporter:

This letter is in lieu of our upcoming newsletter which we will send you upon its completion. There is little question that the stimulus for organizing teams for competition in the GAY OLYMPIC GAMES (GOG-1) will come from the dissemination of news and updates in the publications available to members of the Gay communities (both men and women).

The games are scheduled to begin with opening day ceremonies on August 28th, 1982. We are expecting representatives from cities all over the word and it appears likely that hundreds of cities in the U.S.A. will send contingents.

We are preparing complete information packages to send all those interested in competing. These packages should be ready by November of this year, but the timing of the package should not preclude the organizing and fund raising that each city's Gay community will need to be represented.

On opening day at Kezar Stadium in San Francisco, with a seating capacity of 60,000 people, there will be a ceremony that will rival the traditional Olympic Games.

Alex Rasch, a San Francisco musicologist, is composing an original anthem for the games. The torch that will light the Olympic flame will conclude its journey from Stonewall in New York City, arriving here via a network of runners across the United States.

There will be seven days of competition in various facilities around the city. Athletes will be lodged in private homes. They will have access to all competitive sites via a series of official vehicles making scheduled loops beginning in Castro Village.

Local businesswoman, Chris Puccinelli, is designing an original Olympic medal for the top three places in each event. It will be struck in gold, silver, and bronze. Every athlete, regardless of place of finish will receive a certificate of participation in their sport.

There will be a simultaneous week of cultural events for spectators to attend. Gay men and women: artists, musicians, actors, singers, and dancers will perform and exhibit in halls, theaters, and galleries throughout the city. The representation of a full range of the Gay community's cultural activities will be consistent with the traditional modern olympiads where the purpose was to accentuate all that was athletic and aesthetic. From competition on the playing field to activities of the mind and spirit, these games will truly be a revelation of the cultural health of the men and women in the Gay community. Perhaps it may even be exemplary for the traditional Olympics which today are racked with competition in the political arena, overlooking the grander purpose of the games . . . to bring people together in a friendly spirit of endeavor.

We in San Francisco are preparing our magic city for this historical FIRST GAY OLYMPICS. The games will consist of men and women in serious athletic competition. That does not mean individuals must be world class athletes to compete in the games, but serious, yes! In fact, we wish to emphasize the element of participation rather than winning. Naturally every event will have its champion, but just as important will be the experience of having participated.

We are working through a corporation that is non-profit and tax-exempt. Tax deductible status is pending. We

have no paid positions and all of our endeavors are the result of volunteer efforts. If you agree with what we are doing, we ask you to join this effort with a contribution. It is an historical event.

To send contributions or to request further information, please contact:

G.O.G.
Box 14874
San Francisco, CA 94114

Our next communications will be the newsletter entitled:

"OLYMPICS '82"

It will contain more information and an update on our progress as well as a request form for the complete "Information and Registration Package".

Join in now! It is our turn!

Yours truly,

TOM WADDELL, M.D.
Chairman, GOG Committee

[EXHIBIT J TO WADDELL DECLARATION]

[See *ante* pp. 98, 219]

GAY OLYMPIC GAMES
P.O. Box 14874
San Francisco, California 94114
U.S.A.

[THREE-RING LOGO]

SAN FRANCISCO ARTS AND ATHLETICS
PRESENTS
THE
GAY OLYMPIC GAMES
AND
GAY CULTURAL WEEK

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AND HOUSING

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INTRODUCTION

Greetings!

The idea of an international athletic event for Gay men and women was initiated in 1980 by several members of the Gay community of San Francisco. The initial concept was to provide a games atmosphere for serious athletic competition similar to the traditional Olympic Games, but modified to meet the requirements of Gay communities throughout the world.

The result was the formation of the San Francisco Arts and Athletics to sponsor the Gay Athletic Games and the Gay Cultural Week to complement the Games. San Francisco Arts and Athletics is a non-profit, tax-exempt organization composed entirely of volunteers whose purpose is to sponsor the Games and to educate the public on the vitality, variety and versatility of the Gay community through the promotion of sports events within the framework of Olympic style competition.

The Games are designed to attract competitors from around the world, reflecting the prevalence of Gay organized athletics in the major population centers, and to encourage participation from smaller, less organized areas.

While it is expected that all participating athletes will be striving for excellence, the emphasis of the Games will be on participation, cooperation, and friendship. The presence of an international community of Gay competitors will attest to the idea that athletic competition is dignified and wholesome activity for all people, regardless of their creed, color, age or gender.

• • • •

ELIGIBILITY

The Gay Athletic Games are open to individuals and teams representing a geographically recognized municipality described as a city, township, or village. There

must be an address of the individual or organization residing in that municipality.

There are Games standards established in some, but not all sport events. Please consult the rules and regulations in your chosen sport regarding qualifications.

There are no restrictions for eligibility based on color, creed, gender, nationality, or age.

The Gay Athletic Games will include the major sports listed below. At this time, "Major Sports" are defined to be those sports which enjoy large scale participation by the Gay communities at large.

SPORT	MEN	WOMEN
	X	X
TRACK & FIELD	X	X
BASKETBALL	X	X
BILLIARDS (pool)	X	X
BOWLING	X	X
BOXING	X	X
CYCLING	X	X
GOLF	X	X
POWER LIFTING/ WEIGHT LIFTING	X	X
PHYISQUE	X	X
RUGBY	O	X
SOCCER	X	X
SOFTBALL	X	X
SWIMMING & DIVING	X	X
TENNIS	X	X
VOLLEYBALL	X	X
WRESTLING	X	O
MARATHON	X	X

REGISTRATION

• • • •

REGISTRATION FEES:

• • • •

Any team of four or more in any single sport requires a $100 registration fee. Any individuals or teams up to four requires a $25 registration fee per individual.

Fees must accompany the registration form. Fees must be in, or converted to, American dollars ($). This can be in the form of checks, money orders, or cashiers checques.

No team or individual will be permitted to compete in the Gay Athletic Games unless registered with the Organizing Committee by June 10, 1982.

CENTRAL STAGING AREA

Upon arrival in San Francisco all participants should proceed to the Central Staging Area at METROPOLITAN COMMUNITY CHURCH, 150 Eureka Street, San Francisco 94114 (in the heart of the Castro area). Each participant will be processed through registration at that location.

You will be photographed and a photo-identification card will be laminated with your name, city, sport and competitors number.

You will receive a complete schedule of events with times and locations. You must check this schedule carefully to plan your arrival at the competitive site for your events.

You will be assigned a private home for the duration of your visit. You will be introduced to your host and taken to your quarters. Hosts will extend their hospitality up to and including the Closing Day Ceremonies on September 5, 1982. Hospitality beyond this date is optional for the host.

• • • •

SPORT COMMITTEES

Each individual sport is headed by a local-based chairpersons. These chairpersons have corresponded with others in their sport to draw up a complete package of rules and regulations and a competitive format. They will also be responsible for determining the match-ups of all teams and individuals in the competition. The format, rules and regulations are included in each sport application.

• • • •

RULES OF CONDUCT AND DRESS

Representative athletes from gay communities all over the world will compete in the Gay Athletic Games. The Games will be a reflection of our pride and self-respect as well as our serious intent to perform in our chosen sport.

This historical event will be recorded audio-visually by the gay and non-gay media and will be viewed by spectators of every conceivable persuasion. A full length documentary movie will be made by a well known producer.

It is expected, as participants in the Gay Athletic Games, that while on the playing fields or arenas, all athletes, coaches, trainers, and managers will conform to the spirit and the codes of good sportsmanship, as representatives of their respective cities and of the gay community at large.

It is expected that all persons who are registered to participate in the Games will have acknowledged and accepted the rules and regulations governing their respective sport prior to their arrival at the Games.

All competitive uniforms, warm-up, and marching uniforms must be regulation as defined by the responsive Sport Committee and the Organizing Committee (marching uniforms). Any questions or requests for departures

from the dress code should be addressed to that Sport Committee prior to the Games.

No advertising, slogans, graffiti, or suggestive symbols will be permitted on any uniforms, either competitive, warm-up, or marching.

The Gay Athletic Games Organizing Committee reserves the right to rule ineligible any team or individual who has contravened any of its rules or regulations, or who has acted in a manner which brings disrepute upon the Gay Athletic Games.

The only symbols permitted on any uniforms in the Gay Athletic Games will be the letters describing the name of the city or village represented. The official seal of the city may appear on the left breast of the marching uniform, and on the city flag to be used on Opening Day Ceremonies.

Team numbers may appear on uniforms in those sports which require such identification; i.e. basketball, softball, rugby, soccer, etc., while sports such as track and field, tennis, cycling, etc. will receive individual numbers to be sewn on the competitive uniforms.

AWARDS

An original medal is being struck for the Gay Athletic Games. The top three finishers in each event will receive the medal suspended by a ribbon.

1st Place	Gold
2nd Place	Silver
3rd Place	Bronze

Certificates with event and order of finish will be awarded to the top six places.

Certificates of participation will be awarded to all competitors, listing their sport and event.

Shortly following the final in each event in each sport, the top six place finishers will be announced and the names and respective cities will be displayed. There will be a pause in the activities while the three top finishers will be presented their medals by an official contingent. All names and results will be published daily and distributed to key information points throughout the city. Presently we intend to use the Gay Press Association (G.P.A.) for dissemination of results and human interest stories to all subscribing organizations worldwide.

TRANSPORTATION

Transportation to San Francisco is the responsibility of the organizational or individual registrant. Make your plans as early as possible since this will be a peak season for visitors.

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MEALS

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MEDICAL CARE

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IMMIGRATION

Competitors and spectators attending the Gay Athletic Games could have some difficulties with the Immigration and Naturalization Service, as well as the United States State Department in their foreign embassies.

The first problem could be obtaining a visa to visit the United States. In some countries the applicant must apply in person to the American Embassy or the American Consulate for a visa. The person reviewing the application (in some cases the application itself) may question the applicant's sexual orientation, particularly if it is known that the purpose of the visit is gay-related. If the response to such questions indicates that one is Gay, it is likely in most countries that your visa application

will be denied. There is no redress available from such a denial. In other words, a "yes" answer will prevent you from obtaining a visa, or even subsequent visas.

The second problem could be at the point of entry. As of this date, border guards are not permitted by regulations to inquire about your sexual orientation or preferences. Only two circumstances could cause problems: (1) someone travelling on the same aircraft informs an immigration officer that you are "homosexual" or (2) you make an "unsolicited, unambiguous admission" of homosexuality to a border guard.

Provocative slogans or buttons worn on clothing focus attention on this question and lead to a secondary search. Carrying "homosexual" or gay-related materials, or even personal letters have been known to implicate individuals in a secondary search.

If any of these events occur, you will be called into a private room and asked the question: "Are you a homosexual?" If you respond "No!" you will be permitted to enter. If you respond "Yes!" you will be held to appear before an immigration judge.

To minimize any problems, we suggest the following:

Apply for the longest possible visa. Six months if possible.

Stagger the visas. Don't all apply at once.

Avoid giving pinpointed dates as to where you will be at any particular time during your "vacation".

Just be sure that your visa period overlaps the events you intend to visit. The time before and the time after your event should suit your individual plans.

We will send you names and addresses to contact if any difficulties should occur. This will include legal counsel. Hopefully, none will be needed.

THE GAMES

The Gay Athletic Games are for all gay men and women who are interested in organized athletics. There are 15 sports available with corresponding men's and women's events. Two others, rugby and wrestling, are for women and men respectively.

The term Olympic, in the generic sense, was originally applied to these Games in view of the fact that we are using that particular format to stage the Games. It is somewhat misleading, however, when used in the traditional context. To many it implies an intense, high level of performance geared chiefly to winning. But these Games have a different emphasis in that we are interested in bringing together gay men and women who view athletics as a social and recreational endeavor.

• • • •

PRESS, RADIO, AND TELEVISION COVERAGE

San Francisco Arts and Athletics retains all visual and sound rights to the Gay Athletic Games as stated in the Articles of Constitution.

All gay and non-gay press, radio and television representatives will be welcome at the Gay Athletic Games. With proper identification, all representatives will be issued press cards and given complete information packages.

An official gay news agency may be designated for the most complete and efficient dissemination of the news of the daily events.

A docu-drama of approximately 75 minutes, and a documentary film of approximately 20 minutes is being planned.

OPENING DAY CEREMONIES

All athletes, coaches, trainers and team executives will be expected to participate in the Opening Day Ceremonies on August 28, 1982.

Each team will march behind the flag which represents their city. The flag should have the city or town's name clearly visible. The only other markings on the flag may be the emblem of that city or town.

It is hoped that each team will have marching uniforms. We suggest that the men's and women's uniforms complement each other. In San Francisco, for example, we are tentatively planning for the women to wear white blazers with navy blue slacks, a blue cap and shoes. The men will wear navy blue blazers, white slacks, shoes and fedoras.

Each city should select a single flag bearer to lead the contingent, no matter how small the contingent. The flag bearer will be followed by the coaches, trainers and officials. They in turn will be followed by the women's team, then the men's team.

A parade of marching bands from around the country and the world, twirlers, the flag corps, celebrities, and entertainers will precede the athletes onto the field.

The teams will march in alphabetic order, by city, make one full turn around the periphery of the field to pass the reviewing stand, then one more turn onto the field to line up behind their flags and facing the reviewing stand.

[Sketch of arena omitted in printing]

The program will last approximately four hours. There will be local and professional entertainment. Introductions and speeches will be held to the barest minimum.

The torch bearer will enter the stadium to the combined musical effort of all the bands which will play the original anthem composed for the Gay Athletic Games. All teams will be on the field at the moment the torch

is lit, signifying the opening of the First Gay Athletic Games.

CLOSING DAY CEREMONIES

Closing Day Ceremonies are in the planning stage. It is possible that they will be held in an area other than Kezar Stadium. Details will be made available as they develop. They will he held on Sunday, September 5.

• • • •

INTERPRETERS

We intend to have interpreters available as requested. If you or your group do not speak English we would appreciate hearing from you at the earliest possible date so we may make arrangement to have all relevant information translated into your native language.

We will also arrange to have an interpreter who is trained in your native language to accompany you through the entire nine days of events.

• • • •

[EXHIBIT T TO WADDELL DECLARATION]

[See *ante* p. 98]

ENTERTAINMENT ADVOCATES INC.
5 Buena Vista Terrace
San Francisco 94117
415-861-1167

CONTACT: Fred Ponder or John Rosser
(415) 861-1167

OFFICIAL OLYMPICS ENTERTAINMENT PROMISES SCIENCE FICTION EXTRAVAGANZA

SAN FRANCISCO—The Celestial Lords await you—at the official entertainment event of the Gay Olympics!

"Celestial Lords: A Megasensory Science Fiction Spectacular" will hit the heights fantastic the evenings of August 27, 28 and 29 at San Francisco's magnificent Galleria Design Center. Each evening will be an extraordinary fusion of party, dancing, and theatrical performance featuring world champion body builders, contemporary ballet, and state-of-the-art special effects.

Produced by Entertainment Advocates, Inc. and Rhaz Ziesler, "Celestial Lords" will present the saga of five mythic gods and their journey through the universe. The Celestial Lords are enacted by Tom Platz, Mr. Universe; Scott Wilson, Mr. International; John Brown, Mr. Universe; Shelley Gruwell, Miss America; and "Pillow", Miss California.

Each evening promises to bring science fiction adventure alive, with special effects by Laser Image, the creators of Laserium; lighting designed by Aubrey Wilson, dean of the Design Technology School at California Institute of the Arts; and costumes by W.J. Evans, costumer for the Ice Capades; and sets by Lizette Thomas

and Michael Devine, scenic designers with film, television, and Broadway credits.

And as befits an evening of Olympian celebration, there will be plenty of dancing between acts to the music of DJ Tim Rivers. A no-host bar will be open throughout the evening.

General admission tickets to "Celestial Lords" are $30, and are available for each of the three evening's festivities—Friday and Saturday, August 27 and 28, 9 p.m.-3 a.m., and Sunday, August 29, 7:30 p.m.-midnight. Performances and special effects begin an hour after doors open.

A percentage of anticipated ticket sales has been donated to the Gay Olympics Committee.

Tickets can be purchased nationally through Ticketron outlets, or in San Francisco at BASS outlets, Gramophone, All American Boy, Headlines, Bodycenter, Lenny's Linen Closet, Aloha Records, and Does Your Mother Know.

Those wishing to order by mail can send their checks to Entertainment Advocates, 5 Buena Vista Terrace, San Francisco, Calif., 94117. Please indicate performance date desired.

PRESS PACKAGE AND PHOTOGRAPHS AVAILABLE

[EXHIBIT U TO WADDELL DECLARATION]

[See *ante* p. 98]

[THREE-RING LOGO]

NATIONAL TORCH RUN
STOPS HERE!
DESTINATION: GAY OLYMPIC
GAMES I, SAN FRANCISCO, USA

Gay Olympic Games
P.O. Box 14874
San Francisco, Ca.
94114
415/861-8282

NEWS ADVANCE
FOR IMMEDIATE RELEASE ON ARRIVAL OF TORCH RUN LOCALLY

(Prepared May 26, 1982 by Edwards & Associates Public Relations, (415) 832-6677)

Contacts:

_____

Tom Waddell, M.D., or Mark Brown,
(415) 861-8282/0882/0280

Local sports fans, human rights advocates and history-watchers should take note that _____
(city/town name)
is on the route of the National Torch Run leading to the world's first Gay Olympic Games.

Begun Sunday, June 13 from the Stonewall area of Manhattan's Greenwich Village in New York City, the 4,000-mile cross-country event is scheduled to reach San Francisco, California, Aug. 22.

The hand-carried light being relayed coast-to-coast will be a centerpiece during the Gay Olympic Games I, Aug. 28 to Sept. 5 in San Francisco. An estimated 50,000 people from many cities and towns in the U.S. and several foreign countries will attend the nine-day celebration which includes concurrent Cultural Week activities such as performing and other creative art exhibitions.

A former tavern in New York, called the Stonewall, is the symbolic birthplace of modern gay rights advocacy.

Men and women will compete in the Gay Olympics in 17 different sports in an effort to balance false perceptions of people with alternative sexual preferences. For more information, call (415) 861-8282.

[EXHIBIT W TO WADDELL DECLARATION]

[See *ante* p. 99]

CITY OF BOSTON
OFFICE OF THE MAYOR
CITY HALL BOSTON

KEVEN H. WHITE
MAYOR

PROCLAMATION

WHEREAS: August 28, 1982 marks the beginning of the first International Gay Olympic Games which will be conducted in San Francisco, California; and

WHEREAS: 1500 athletes from 15 countries, 25 states and 110 cities will be competing in a variety of athletic endeavors from August 29, through September 5; and

WHEREAS: 72 athletes from the City of Boston will be traveling to compete in these events; and

WHEREAS: the Gay Olypmic Games will foster a sense of self-esteem, community spirit and cooperation;

NOW, THEREFORE: I, Kevin H. White, Mayor of the City of Boston do hereby proclaim the week of August 28 through September 5 as

[SEAL]

GAY OLYMPIC GAMES WEEK

and urge the citizens of Boston to recognize this special tribute.

/s/ Kevin H. White
Mayor

[EXHIBIT X TO WADDELL DECLARATION]

[See *ante* p. 99]

A2 ****N May 23, 1982
S.F. Sunday Examiner & Chronicle

Bill Mandel

[Photograph omitted in printing]

A very serious Gay Olympics

WHEN PLANS FOR this summer's San Francisco Gay Olympics were announced, cynics snickered, thinking the event might bring new meaning to the term "drag races."

But now, three months before the games are set to begin, the snickering has stopped. Under the leadership of 1968 U.S. Olympic decathlon team member Tom Waddell, the Gay Olympic Games are shaping up as a legitimate meeting of thousands of athletes—women and men, gay and straight—from around the world.

As of this week, more than 3,000 athletes representing scores of American cities and at least five foreign countries have registered to compete in 16 sports during the games, which will run from Aug. 28 to Sept. 5. The games are open to athletes of any sexual persuasion.

The organizing committee has also received commitments from enough certified officials in each sport to guarantee world-class officiating.

Beyond the excitement of gathering so many athletes, officials and spectators for an athletic spectacle, the Gay Olympics are emerging as a potent socio-political symbol.

By demonstrating the broad reach of the gay community—from the stereotypical flash of marching bands to the unexpected roughness of the soccer field—the Gay Olympics will do much to dispel prejudice and ignorance.

• • • •

UNFORTUNATELY, there's plenty of prejudice and ignorance to be found at the intersection of athletics and homosexuality.

"At the highest level of sports," recalls Waddell, 44, who is now a physician and corporate consultant, "it's just naturally assumed that all the male competitors are macho lovers. We're all big, strapping athletes, so everybody figures we must be great ladies' men."

Waddell, who placed sixth in the world at the '68 Mexico City Olympics, was closeted during the height of his athletic career.

"When I came out in the early '70s," he says, "all my old teammates stopped talking to me. They figured I was just a sick guy who should be ignored."

The issue of homosexuality in sports has arisen more and more frequently in reecent years. Billie Jean King's highly publicized and highly sanitized discussion of her homosexuality put the spotlight on women's tennis, where gay athletes form an important nucleus of the game's top players.

There have been reports of homosexuality in men's pro sports, especially football. But "revelations" about gay women or men athletes shouldn't shock anyone. There are gay people in every walk of life, filling important, responsible positions. That's the point of the Gay Olympics.

"Obviously, a lot of athletes are going to be making a statement by competing," Waddell told me. "But straight athletes are more than welcome. Our feeling is, if a straight athlete wants to participate and go around the country showing off his or her gold medal from the Gay Olympics, that's great."

• • • •

WADDELL'S SUCCESS in sports and in his profession earned him the 1980 Cable Car Award as Outstanding Gay Male Athlete. The idea for this summer's games popped out of his mouth at the awards banquet.

"I just told the crowd it would be great if San Francisco could host a gay Olympics," he says, "and the audience went crazy. I was trapped, in a way. The idea had been born, now we had to nurture it."

Along with Mark Brown, who was instrumental in raising San Francisco's Gay Softball League to international prominence, Waddell and a staff of volunteers began the hundreds of tasks necessary to mount an Olympic-style competition.

They were nearly stripped of the term "Olympics" earlier this year, when the U.S. Olympic Committee (USOC) asserted ownership of the word and demanded the San Francisco games drop its use.

This struck Waddell's group as discriminatory inasmuch as "Olympics" was being used quite freely in such events as the Crab Cooking Olympics in San Francisco, the Dog Olympics in Texas, the Armenian Olympics in Hayward, the Diaper Olympics in Los Angeles and the Rat Olympics in Sacramento.

The USOC has since backed off, says Waddell, who plans to continue use of "Olympics."

City institutions have cooperated handsomely with the organizers: San Francisco State (swimming, track and field), Kezar Pavilion (basketball), Kezar Stadium (rugby), Harding (golf), Golden Gate Park (tennis), Balboa Stadium (soccer), Lincoln High (volleyball) and McAteer High (wrestling).

The games will include competitions in billiards, bowling, boxing, cycling, weightlifting, bodybuilding, softball, diving and the marathon.

All will offer men's and women's divisions except for wrestling (men only) and rugby (women only).

Like its quadrennial parallel, the Gay Olympics will boast TV coverage: The BBC is sending crews for international broadcast, and Polaris Communications, a gay-oriented American cable-TV operation, will tape the events for domestic airing.

[EXHIBIT Y TO WADDELL DECLARATION]

[See *ante* p. 99]

GAY OLYMPIC GAMES

[Three-Ring Logo]

Gay Olympic Games
P.O. Box 14874
San Francisco, CA.
84114
415/861-8282

NEWS
FOR IMMEDIATE RELEASE ON RECEIPT

An Introduction to the first
GAY OLYMPIC GAMES, Aug. 28 through Sept. 5, 1982
Hosted by San Francisco, California, USA

(A Background Release, revised July 1982)

For more information, call:
Tom Waddell, M.D., or Mark Brown
(415) 861-8282, 0882 or 0280

LATE INTEREST FROM FORMER OLYMPIANS, 12 COUNTRIES EXTENDS DEADLINES

At least three former U.S. Olympic team athletes and entries from a dozen other countries have prompted the organizers of the first Gay Olympic Games to continue accepting registrations until at least August 10 for the San Francisco games opening August 28.

By early July, nearly 1,000 women and men had registered for the historic competition and associated Cultural Week activities which will run nine days through September 5.

Planning for the first Gay Olympics began in 1980 when a small group of gay athletes and sports fans envisioned "an opportunity to expand our image and educate the general public on the vitality, variety and versatility of the gay community. . . ."

By early 1982, a young nonprofit and volunteer sponsoring organization called San Francisco Arts & Athletics had been formed and quickly attracted interest from more than 2,000 potential participants in about 20 countries. Some of the athletes have been top ranked in their sport.

By July 1, at least three former U.S. Olympians were among the registered athletes—one of them a woman swimmer—although emphasis remains on participation, not competition.

By opening ceremonies Aug. 28 at Kezar Stadium in San Francisco, the Gay Olympics expects about 2,000 women and men present for competition in 17 different sports. An estimated 30,000 visitors may gather in San Francisco during the nine-day celebration which also includes artistic exhibitions and performances showcasing many kinds of creative talent.

Registration (at $25 per person or $100 per team of four or more) will remain open until at least August 10 to people representing any city or town in the world. Game standards are established in all sports, and rules and qualifications are available for each sport by writing the Gay Olympics, Box 14874, San Francisco, CA 94114, USA. Telephone (415) 861-8282 or 861-0882.

Tickets for the opening ceremonies August 28 and the closing ceremonies September 5 are available to the public at $15 each or $25 for both, prepaid by check or money order to the above address. (You may visit the offices at 597 Castro at 19th St., San Francisco.)

The 17 sports organized under the Gay Olympic Games are: basketball, billiards, bowling, boxing and cycling; golf, marathon, physique, powerlifting, rugby (women only), and soccer; softball, swimming and diving, tennis, track and field, volleyball and wrestling (men only).

One of the former Olympians competing is Tom Waddell, M.D., chairman of the Gay Olympic Games organizing committee who placed sixth in decathlon for the USA in the 1968 summer games in Mexico. Mark Brown, former sports writer who helped bring gay softball to national prominence in the U.S., chairs the sports committee with the support of co-chair Alita Rosenfeld.

Introductory material sent to interested athletes says, in part:

"While it is expected that all participating athletes will be striving for excellence, the emphasis of the games will be on participation, cooperation and friendship. . . .

"Obviously, many gay men and women who are not 'out' will exclude themselves from the competition. That is understandable since many of them who enjoy athletics would jeopardize themselves by appearing in the games. Hopefully, they will lend their support in the form of donations and by appearing as spectators. That leaves it up to those of us who live openly in the gay sub-culture to make the strongest possible statement with this exciting opportunity," writes the sponsors.

In January, 1982, the U.S. Olympic Committee based in Colorado Springs challenged the Gay Olympic Games under threat of a lawsuit to stop using the words Olympic and Olympiad. The Gay Olympic Games organizers expect their rights to use the words are legally justified and, therefore, continue using the name, Gay Olympic Games.

The games are being financed by tax-deductible contributions, special fund-raising benefits, sales of posters,

buttons and t-shirts, and from concessions, nominal registration fees and ticket sales.

By early July, about $75,000 had been raised toward a budget goal of over $200,000—not including funds for individual or team participants such as travel expenses being raised separately world-wide.

While each participant or team is responsible for their own food and transportation, San Francisco residents are volunteering to arrange free housing for visiting athletes in private homes. More volunteers for housing and about 20 other working committees are still needed, and are growing in proportion to registrations.

U.S. visitors to the Gay Olympics who are arriving before the August 28 opening or remaining in the Bay area after the closing ceremonies September 5 are also encouraged to help in any way they can.

Hundreds of small and large business organizations and professionals from the San Francisco Bay area, other states in the U.S. and some other countries have contributed money, time, talent and business products and services to the Gay Olympics. Much more sponsorship is needed, however.

Those individuals or businesses contributing at least $200 in cash in a single donation are considered official sponsors, and may be recognized with special attention in the published program.

Because the paperwork required to complete the tax exemption of San Francisco Arts & Athletics is still in process at the government level, all donations should be made payable to the San Francisco Tavern Guild Foundation to be tax-deductible.

For the convenience of callers, there is a 24-hour answering machine on the main Gay Olympics telephone number, (415) 861-8282.

For special information about the women's outreach efforts, which have achieved growing success—including women participants in every sport—call Sports Co-chair Alita Rosenfeld at (415) 472-1309.

(end)

(Prepared as a public service by
Edwards & Associates Public Relations,
(415) 832-6677)

CALENDAR LISTINGS

1) First International GAY OLYMPIC GAMES
Aug. 28 through Sept. 5
San Francisco, California
USA

2) Gay Cultural Week
(concurrent with Gay Olympic Games; calendar for visitors to Bay Area)

3) Arrival in San Francisco
of Gay Olympic Games'
NATIONAL TORCH RUN
Aug. 22, 1982 via Golden Gate Bridge (time to be announced)

4) News Briefing and
Pre-Games Press Reception
Thursday, Aug. 26, 1982,
4 to 8 p.m.
141 Albion St. (Albion Hall)
between Valencia, Guerrero,
16th and 17th,
San Francisco

All Working News Media People Welcome

5) Celestial Lords: A
Megasensory Science Fiction
Spectacular
August 27, 28, 29, Evenings
Galleria Design Center
Call 861-1167 for more information. (Official entertainment event of the Gay Olympics; independent production)

6) Opening Ceremonies:

Gay Olympic Games
Saturday, Aug. 28, 1982, 1 p.m.
Kezar Stadium, Golden Gate Park
San Francisco

7) Closing Awards Ceremonies

Gay Olympic Games
Sunday, Sept. 5, 1982, 12 noon
Kezar Stadium

For more information on any events and latest schedules, call (815) 861-8282, 0280 or 0882.

• • • •

GAY OLYMPIC GAMES

[THREE-RING LOGO]

May 27, 1982

Dear Editors and News Directors:

A historic sporting event and cultural celebration involving the world's lesbian and gay community is approaching August 28 through September 5, 1982. It is not only the first Gay Olympic Games, it is an opportunity for human rights advocates of all sexual preferences to help us better inform the general public on the vitality, variety and versatility of the gay community.

We need your help to tell an important story. We offer you our help and strong encouragement in this important process.

The news releases and other information materials prepared for the working press and electronic news media may not be as complete and as brightly written as the reports you write and often publish, but we hope they will give you some good ideas about how to begin coverage of the Gay Olympic Games.

We will continue to gather and prepare current information for your use, and we look forward to hearing from you as our international event approaches and unfolds.

Please note that the National Torch Run, a symbolic and meaningful prelude to the Gay Olympics, departs New York City Sunday, June 13 and arrives in San Francisco August 22. Along their route, up to 2,000 runners, cyclists and others will be threading goodwill, information and important fund-raising events into a kind of new, homespun weave to be part of our social fabric.

If you live or work anywhere near the torch route, we hope you can develop a significant local feature.

If your publication or station plans to cover the Gay Olympic Games in San Francisco, please let us know so we can plan to assist you. If you cannot provide direct coverage, we will do our best to keep you informed by mail. Please let us know.

Thank you in advance for your efforts in reporting a grassroots project of many communities of the world. With your help, we are confident that many of our common social goals and objectives will be realized.

/s/ Tom Waddell
Tom Waddell, M.D.
Chairman, Organizing Committee

[EXHIBIT BB TO WADDELL DECLARATION]

[See *ante* p. 100]

[Emblem with runner and:]

10th Annual Armenian Olympics 1978
Hayward California

[EXHIBIT N TO KLINE DECLARATION]

[See *ante* p. 216]

[United States Olympic Committee letterhead]

June 16, 1983

Muscular Dystrophy Association
1713 S. Avondale
Amarillo, TX 79106

Re: *Bar Olympics*

Dear Sirs:

This office has recently become aware of a one-day sports competition entitled "Bar Olympics" scheduled for Sunday, August 15, 1983 at Sam Houston Park, which you are sponsoring. You are also offering a "Bar Olympics t-shirt" for said event. We must bring to your attention the fact that federal legislation precludes your use of the word "Olympic," any derivative thereof, other related terminology, as well as use of specific logos and emblems, including the five interlocking Olympic rings. Public Law 95-606 (36 USC 371), a copy of which is enclosed, reserves exclusive use of Olympic language and insignia for the United States Olympic Committee.

We strongly support the goals and objectives of Muscular Dystrophy, both at the local and the national levels. However, we do not feel that this is an appropriate method of fund-raising.

We are sure that you would not intentionally violate the federal law and we hasten to bring the enclosed excerpt to your attention. Accordingly, we must ask that you refrain from using any Olympic reference or rings regarding your events, competitions, t-shirts, other apparel, advertising, or other material under your control.

Please indicate your written compliance with the law at your earliest convenience.

With all good wishes, I remain,

Sincerely,

F. DON MILLER

FDM/ghm
Enc.
CERTIFIED MAIL
RETURN RECEIPT REQUESTED
cc: Richard G. Kline, Esquire
Vaughn Walker, Esquire

Mr. Brian Porter
Anheuser-Busch
One Busch Pl.
St. Louis, MO 63118

Muscular Dystrophy Association
810 Seventh Avenue
New York, NY 10019

[EXHIBIT O TO KLINE DECLARATION]

[See *ante* p. 217]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 83-539

UNITED STATES OLYMPIC COMMITTEE,
Plaintiff,

v.

MARCH OF DIMES BIRTH DEFECTS FOUNDATION,
Defendant.

[Filed July 1, 1983]

FINAL JUDGMENT

It appearing to the court that plaintiff, United States Olympic Committee, and defendant, March of Dimes Birth Defects Foundation, have agreed to entry of a Final Judgment as a full and complete adjudication of this action, it is therefore ORDERED, ADJUDGED and DECREED THAT:

1. The court has jurisdiction over defendant and the subject matter of this action for the relief being sought.

2. March of Dimes Birth Defects Foundation, its affiliated constituents and related organizations as well as successors or assigns, officers, representatives, agents and employees are permanently enjoined, pursuant to 36 U.S.C. § 380, from using or causing to be used "OLYM-

PIC", "OLYMPICS", or any diminutive thereof, without the consent of the United States Olympic Committee, for the solicitation of contributions or to promote, authorize, sponsor, or endorse any type of competition or activity.

3. Nothing herein will preclude defendant from entering into an agreement with the United States Olympic Committee to permit lawful use of "OLYMPIC" or "OLYMPICS".

4. Except as expressly provided herein, all other claims in this action are dismissed.

5. Each party shall bear its own costs and attorneys fees.

/s/ [Illegible]
United States District Judge
July 5, 1983

AGREED:

UNITED STATES OLYMPIC COMMITTEE

By /s/ P. Don Miller
P. DON MILLER
Executive Director
Dated 6/23/83

AGREED:

MARCH OF DIMES BIRTH DEFECTS FOUNDATION

By /s/ [Illegible]
Title: President
Dated 6/13/83

[EXHIBIT P TO KLINE DECLARATION]

[See *ante* p. 217]

[Names of counsel omitted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV-83-2697 RG (Gx)

UNITED STATES OLYMPIC COMMITTEE;
LOS ANGELES OLYMPIC ORGANIZING COMMITTEE,
Plaintiffs,

vs.

ADELMAN ENTERPRISES, INC., a corporation doing business as MURRAY'S TICKET AND TRAVEL BUREAU,
Defendant.

CONSENT JUDGMENT

This matter having come before the Court, Honorable Richard A. Gadbois, Jr., District Judge, presiding, on the complaint of plaintiffs, and it appearing to the Court that plaintiffs and defendant have reached agreement to resolve their differences by the entry of this judgment, and plaintiffs and defendant having agreed that entry of this judgment shall constitute a full, complete and final adjudication of this action, and the Court having reviewed this judgment, and it appearing to the Court that this judgment is in accordance with the findings of fact and conclusions of law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant Adelman Enterprises, Inc. and its owners, representatives, directors, officers, agents,

employees and all persons acting in concert or participating with them (all hereinafter referred to collectively as "Murray's"), be and hereby are permanently enjoined from doing any of the following:

1. Using or causing to be used in any form whatever, for the purpose of trade, or to induce the sale of any goods or services, the "Star in Motion" design (as illustrated by Exhibit "A" hereto), the "Olympic Symbol" of five interlocking rings (as illustrated by Exhibit "B" hereto), or any colorable imitation or simulation of either of them, either alone or in association with any other designation;

2. Making any statement or representation tending to cause others to believe that Murray's is in any way connected with plaintiffs, or either of them, or with any Olympic activity; and

3. Falsely representing to the public or to any person that Murray's has, or has a contractual right to obtain, tickets to any events (including opening and closing ceremonies) of the 1984 Summer Olympics (hereinafter collectively referred to as "Olympic Events").

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant Adelman Enterprises Inc. shall do each of the following:

4. Within five working days following the entry of this Consent Judgment, send by first class mail a letter, in the form attached hereto as Exhibit "C" (hereinafter referred to as the "Letter"), to each and every person from whom it has received a deposit purportedly for the purchase of tickets to any Olympic Event;

5. Send the Letter, within five working days of the receipt of any deposit which it may receive in the future where such deposit is purportedly for the

purchase of tickets to any Olympic Event and is accompanied by the purported "1984 Priority Olympic Order Form" (a copy of which is attached hereto as Exhibit "D"), to each and every such future depositor;

6. Refund within five working days of receipt of any request for such refund, all deposits the refund of which is requested by any person to whom the Letter is required to be sent by this Consent Judgment;

7. Deliver to plaintiffs' counsel for destruction or other disposal, within ten working days of the date of this Consent Judgment, all brochures, pamphlets, advertisements and other written materials which exhibit or display the Olympic Symbol or the Star in Motion; and

8. File with the Court and serve on plaintiffs' counsel, thirty days following the date of this Consent Judgment, a report in writing under oath setting forth the manner and form in which it has complied with this Consent Judgment (the names and addresses of persons to whom Adelman Enterprises Inc. sends the Letter pursuant to paragraphs 4 and 5 hereof, and to whom it makes refunds pursuant to paragraph 6 hereof, shall be included in such written report, but may be appended to it as a separate attachment which need not be served on plaintiffs); and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant Adelman Enterprises Inc. shall immediately serve a copy of this Consent Judgment on all of its officers, directors, agents, servants, successors and assigns, and shall serve on plaintiffs' counsel thirty days following the date of this Consent Judgment a statement listing all persons so served; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant Adelman Enterprises Inc. pay and deliver to plaintiff Los Angeles Olympic Organizing Committee the sum agreed upon by and between counsel for the parties in settlement of all claims against it.

IT IS SO ORDERED this 23rd day of May, 1983.

/s/ Richard A. Gadbois, Jr.
RICHARD A. GADBOIS, JR.
United States District
Court Judge

APPROVED AS TO FORM
AND CONSENT:

ADELMAN ENTERPRISES INC.

By /s/ Ronald Arak
Ronald Arak, Attorney at Law
14651 Ventura Boulevard, Suite 350
Sherman Oaks, California 91403

DATED: May 18, 1983

• • • •

[EXHIBIT Q TO KLINE DECLARATION]

[See *ante* p. 217]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-969

UNITED STATES OLYMPIC COMMITTEE,
Plaintiff,

v.

INTERNATIONAL FEDERATION OF BODY BUILDERS, *et al.*,
Defendants.

ORDER

This matter comes before the court on plaintiff's motion for a contempt judgment. Plaintiff, United States Olympic Committee ("Olympic Committee") asks this court to find that defendants have violated the court's order and final judgment of June 13, 1983 and to find defendants in contempt of that order. In addition, plaintiff requests that this court award its various forms of relief.

Discussion

This court's final judgment of June 13, 1983 enjoined defendants International Federation of Body Builders ("IFBB") and others from using to promote the sale of goods, or to promote any athletic competition, various Olympic symbols, the words "Olympic", "Olympia", "Olympian", or any colorable imitation or simulation thereof. The judgment permitted the IFBB to use the term "Mr. Olympia" as a service mark to promote and conduct its annual professional bodybuilding contest.

In addition to enjoining the defendants from using symbols and words identified with the Olympic Committee, the judgment enjoined defendants from "making any statement or representation which refers to or uses any of the aforementioned terms or symbols . . . in such a way as to tend to cause a mistake or to deceive others into believing that any defendant or any of their services or products are in any way associated with, approved, sponsored or otherwise affiliated [with the plaintiff]." Judgment, ¶ 2.

On June 23, 1983, plaintiff brought this motion for contempt. Plaintiff had monitored the publications of the IFBB and the advertisements of Weider Health and Fitness and alleges that defendants have engaged in a number of violations of the injunction. Plaintiff alleges, *inter alia*, that defendants have used the term "Olympian", "Olympic", and "Mr. Olympia" in contexts that violate this court's order and judgment, and that defendants continue to publish articles that lead readers to believe that defendants or their products are associated with the Olympic Committee. The court has reviewed plaintiff's motion, and the exhibits attached thereto, as well as defendants' opposition and exhibits. Additionally, on July 21, 1983, this court held a hearing on the motion for contempt, and heard argument directed at each alleged violation of the injunction. The court shall address each of the allegations below.

1. Plaintiff argues that defendants have refused, despite repeated requests from the Olympic Committee, to deliver infringing labels, signs, prints, packages or other items bearing the Olympic terms or symbols to the Committee as ordered by this court's final judgment. Defendants represent, however, that they have delivered all such materials to the Committee for destruction, and that they retain no material in violation of this court's order. Because of plaintiff's skepticism, and this court's belief that

compliance with this provison must be assured, it is, by the court, this 8th day of August, 1983,

ORDERED that defendants shall make available for inspection by plaintiff all printing, publishing, distribution, or storage facilities used by defendants in preparing any of the items set forth in this court's final judgment. In addition, defendants shall make available for interview, at a mutually convenient time and place, any official, technician, or other employee of the defendants responsible for, or without knowledge of, the production, distribution, or storage of any of the items in question. Defendants shall cooperate with plaintiff's effort to ensure compliance with this court's order, and with plaintiff's efforts to ensure that all materials set forth in that order and judgment are delivered to the plaintiff for destruction.

In addition, it appearing to the court that defendants have failed to deliver the infringing materials to the Olympic Committee as required by this order, or within a reasonable time following the date set forth in this order, it is, by the court

ORDERED that defendants shall reimburse the Olympic Committee for the costs of bringing this motion for contempt, including the costs of monitoring and investigating defendants' actions and publications to detect noncompliance, and reasonable attorneys' fees.

2. Plaintiff argues that defendants are continuing to promote for sale in the United States, certain food supplement and vitamin products bearing the Olympic designation "Olympian." The court finds that defendants violated the terms of the injunction when it distributed within the United States advertising and promotional material for "Olympian" products sold by the Weider organization. It is, therefore, by the court,

ORDERED that defendants shall cease and desist from using the term "Olympian" for the purpose of trade, and

to induce the sale of goods or services in the United States.

3. Plaintiff argues that defendants have violated the terms of the injunction by promoting for sale a "Mr. Olympia" barbell/dumbbell set. This court agrees that any trade usage of the term "Mr. Olympia" violates the injunction. It is, therefore, by the court,

ORDERED that defendants shall, except as provided in ¶ 5 of this Order, cease and desist from using the term "Mr. Olympia" for the purpose of trade to induce the sale of goods.

4. Plaintiff also argues that defendants' sale and promotion of an "Olympic" barbell/weight training set violates the terms of the injunction. The court finds that defendants' use of the term "olympic" to describe or promote a barbell or other weight training instrument violates the injunction. If defendants' weight training sets are not manufactured to Olympic specifications, this court cannot permit the term "olympic" to be used to describe such equipment. Accordingly, it is, by the court,

ORDERED that defendants shall cease and desist from using the term "olympic" to describe any weight training equipment unless such equipment is manufactured in accordance with Olympic specifications.

5. Plaintiff also argues that the use of the term "Mr. Olympia" as an endorsement to induce the sale of Weider Health and Fitness food supplements violates the terms of the injunction. Plaintiff concedes that former Mr. Olympia contestants may properly endorse Weider products, but argues that the use of the term "Mr. Olympia" in those advertisements without immediate reference to an individual contestant is a violation of the injunction. This court agrees. The court did, of course, permit the IFBB to use the term "Mr. Olympia" as a service mark to promote its professional bodybuilding contest. The

court finds that the endorsements of commercial products by former, named Olympia contestants is a permissible and non-infringing use of the word "Mr. Olympia". However, such use is a reasonable extension of the use of "Mr. Olympia" as an identification and service mark only if the phrase is used as an endorsement by a specific, named, Mr. Olympia contestant. Defendants may not, consistent with this court's judgment and findings, use the term "Mr. Olympia," or refer to "the Mr. Olympia", or generically to "the Mr. Olympia winners" in the text or body of any advertisement, nor may defendants otherwise link the product to the phrase "Mr. Olympia" in any fashion except as set forth above.[1]

Accordingly, it is, by the court

ORDERED that defendants shall cease and desist the use of the term "Mr. Olympia" to promote the sale of any product, except that defendants shall be permitted to use the phrase "Mr. Olympia" as an endorsement, when such endorsement is made by a former "Mr. Olympia" contestant.

6. Plaintiff also alleges that defendants' use of the olympic torch as part of the word "Olympia" for the purpose of inducing the sale of goods violates the final judgment in this case. Defendants concede this violation. Accordingly, it is, by the court,

ORDERED that defendants shall cease and desist from using the olympic torch, or any other olympic symbol, to induce the sale of goods or services.

---

[1] An example of an advertisement with partially infringing copy is found at plaintiff's Ex. G at 6. In this advertisement, the endorsement by Frank Zane, a former "Mr. Olympia" winner, reflects a proper use of the phrase "Mr. Olympia." However, the bold heading entitled, "Here's An Advantage Shared by the Mr. Olympias," as well as the bottom caption, "An Advantage Shared by the Mr. Olympias" are trade usages of the phrase which cannot be characterized as endorsements. Accordingly, they are improper.

7. Plaintiff further argues that defendants' use of the word "Olympia" to describe its professional bodybuilding contest without the prefatory title of "Mr." violates the final judgment. Plaintiff is referring to an article in the April and May editions of *Muscle & Fitness* magazine. The article described the 1982 "Mr. Olympia" contest, yet conspicuously and consistently omitted the word "Mr." from its description of the contest. This court finds that defendants' journalistic shorthand for the contest unnecessarily confuses defendants' bodybuilding competition with the activities of the Olympic Committee. Such misleading use of the term "Olympia" is clearly prohibited by the terms and language of the final judgment entered in this case. Accordingly, it is, by the court,

ORDERED that defendants cease and desist use of the term "Olympia" to describe its body building contest, without the courtesy prefix of "Mr."

8. Plaintiffs also argue that an article entitled "Bound for the Olympics" found in the August, 1983 edition of *Flex* magazine violates the injunction because the title of the article and its contents allegedly contain statements that would tend to mislead readers of the publication to believe that the IFBB is associated with the Olympic Committee. This court finds that the factual, accurate account of the IFBB's ongoing efforts to gain Olympic affiliation is neither deceptive nor misleading.

9. This court finds that defendants' efforts to purge its publication of infringing references to the Olympic Committee have been imperfect. Defendants maintain that some of the violations detected by plaintiffs were minor, and incidental, and will be not repeated. Nevertheless, plaintiff's monitoring efforts have detected numerous violations of the injunction, and plaintiff cannot be expected to bear the cost of monitoring compliance with this Order indefinitely. Accordingly, this court again orders defendants to take all reasonable steps to ensure compliance

with this court's final judgment, and with this Order. Upon a finding that the defendants have engaged in further violations of this court's orders, this court shall consider imposing more serious sanctions.

/s/ Thomas A. Flannery
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0969
Judge Flannery

UNITED STATES OLYMPIC COMMITTEE,
Plaintiff,

v.

INTERNATIONAL FEDERATION OF
BODY BUILDERS, *et al.*,
Defendant.

[Filed Jan. 13, 1983]

JUDGMENT

This matter having come before the court on the amended Complaint of the plaintiff and the answers of the defendants; and the trial of this matter having been to the court commencing on July 12, 1982, and the court having heard the argument of the parties on August 30, 1982, and the court having reviewed all the evidence and legal memoranda and written submissions of the parties; and the court having made findings of fact and conclusions of law pursuant to F.R.C.P. 52, filed December 1, 1982, it is hereby:

ADJUDGED, DECREED and ORDERED that Defendants be and each of them hereby are Permanently Enjoined from:

1) Using or causing to be used in any form whatever for the purpose of trade, to induce the sale of any goods

or services, or to promote any theatrical exhibition, athletic performance, or competition, the Olympic symbol of interlocking rings, regardless of numbers; the representation of a torch or flame; the words "Olympic," "Olympia," "Olympian," or any colorable imitation or simulation thereof, either alone or in combination: Provided, however, that defendant IFBB may use and register "Mr. Olympia" as a service mark for the conduct of an annual professional bodybuilding, or muscle beauty contest of the type previously held by defendanut I.F.B.B.

2. Making any statement or representation which refers to or uses any of the aforementioned terms or symbols or the name of the United States Olympic Committee in such a way as to tend to cause a mistake or to deceive others into believing that any defendant or any of their services or products are in any way associated with, approved, sponsored or otherwise affiliated in any fashion with the United States Olympic Committee, the International Olympic Committee or with any Olympic activity.

FURTHER ORDERED that all labels, signs, prints, packages, wrappers, recepticles, advertisements, wherever appearing, or other items bearing or reproducing any Olympic terms or symbols, or any colorable imitation or simulation thereof, shall be withheld from sale or distribution, wherever located, commencing January 26, 1983 and together with all plates, molds, matrices or other means of making the same, shall be delivered to plaintiff or plaintiff's representatives for destruction or other disposal, on or before February 12, 1983, at a location to be designated by Plaintiff.

FURTHER ORDERED that Defendants shall immediately serve a copy of this Order upon all their officers, agents, consignees except magazine consignees, and I.F.B.B. members or employees and shall serve upon Plaintiff February 12, 1983, a certified statement listing all persons so served.

FURTHER ORDERED that the court having reviewed, *de novo*, the decision of the Trademark Trial and Appeal board regarding the service mark "MR. OLYMPIA", the court does sustain that decision and, accordingly, judgment is entered in favor of the defendant, International Federation of Body Builders, on the issue of registration of the service mark "MR. OLYMPIA" for a professional muscle beauty contest.

FURTHER ORDERED that the plaintiff's prayer for damages, accounting, and attorneys fees be, and the same is hereby denied.

FURTHER ORDERED that plaintiff shall submit a bill of costs within thirty (30) days of entry of this Order.

IT IS SO ORDERED this 13th day of January, 1983.

/s/ Thomas A. Flannery
United States District Judge

[EXHIBIT R TO KLINE DECLARATION]

[See *ante* p. 217]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-3239

UNITED STATES OLYMPIC COMMITTEE
1750 East Boulder Street
Colorado Springs, Colorado 80909
(303) 632-5551

Plaintiff,

v.

MILLSPORT INC.
437 Madison Avenue
New York, New York 10022

SPORT GRAPHICS, INC.
1655 Elmwood Avenue
Cranston, R.I. 02910

and

INTELICENSE CORPORATION SA
Case Postale 215
1211 Geneva 26
Switzerland

Defendants.

[Filed Mar. 10, 1983]

FINAL JUDGMENT

It appearing to the court that the parties United States Olympic Committee and defendant Millsport Inc. have mutually agreed to a settlement of the action and have consented to entry of a Final Judgment as a full and complete adjudication of this action as to Millsport, it is therefore, ORDERED, ADJUDGED and DECREED that:

1. The court has jurisdiction over defendant Millsport and the subject matter of this action for the relief being sought.

2. Millsport Inc., including its successors or assigns, officers, representatives, agents, servants, employees, and any company owned or controlled by Millsport be and hereby is permanently enjoined pursuant to 36 U.S.C. § 380 from using or causing to be used in any form, without the consent of the United States Olympic Committee, for the purpose of trade, to induce the sale of any goods or services in the United States, the Olympic symbol consisting of five interlocking rings or any colorable imitation or simulation thereof.

3. Notwithstanding paragraph 2 hereof, if a Final Judgment is entered against the United States Olympic Committee by the United States District Court for the District of Columbia in Civil Action 82-3239, the provisions of Paragraph 2 of the Final Judgment permanently enjoining use by Millsport Inc. of the Olympic symbol shall be of no further force and effect.

4. Nothing herein will be deemed to deny Millsport the right to enter into an agreement with a licensee or permitee of the United States Olympic Committee which permits Millsport to utilize the Olympic symbol for the purposes of trade, to induce the sale of any goods or services in the United States.

5. Except as expressly provided herein, all other claims in this action are dismissed as to Millsport Inc., without prejudice to the United States Olympic Committee seeking further different relief from any other defendant.

6. Each party shall bear its own costs and attorneys fees.

/s/ [Illigible]
United States District Judge

AGREED

UNITED STATES OLYMPIC COMMITTEE

By /s/ Richard G. Kline
RICHARD G. KLINE
Attorney for Plaintiff
Beveridge, DeGrandi & Kline
1819 H Street, N.W.
Washington, D.C. 20006
(202) 659-2811

AGREED

MILLSPORT INC.

By /s/ Leonard Orkin
LEONARD ORKIN
Attorney for Defendant Millsport Inc.
Davis & Gilbert
850 Third Avenue
New York, New York 10022
(212) 593-0707

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-3239

UNITED STATES OLYMPIC COMMITTEE,
Plaintiff,

v.

MILLSPORT INC.,
SPORT GRAPHICS, INC.,
INTELICENSE CORPORATION SA,

and

INTERNATIONAL SPORTS
MARKETING, INC.,
Defendants.

[Filed May 10, 1983]

FINAL JUDGMENT

It appearing to the court that plaintiff United States Olympic Committee and defendant Sport Graphics, Inc. have mutually agreed to entry of a Final Judgment as a full and complete adjudication of this action as to Sport Graphics, Inc., it is therefore, ORDERED, ADJUDGED and DECREED THAT:

1. The court has jurisdiction over defendant Sport Graphics, Inc. and the subject matter of this action for the relief being sought.

2. Sport Graphics, Inc., including its successors or assigns, officers, representatives, agents, servants, em-

ployees, and any company owned or controlled by Sport Graphics, Inc. be and hereby is permanently enjoined pursuant to 36 U.S.C. § 380 from using or causing to be used in any form, without the consent of the United States Olympic Committee, for the purpose of trade, to induce the sale of any goods or services in the United States, the Olympic symbol consisting of five interlocking rings or any colorable imitation or simulation thereof.

3. Nothing herein will be deemed to deny Sport Graphics, Inc. the right to enter into an agreement with a licensee or permittee of the United States Olympic Committee which allows Sport Graphics, Inc. to lawfully use the Olympic symbol for the purposes of trade, to induce the sale of any goods or services in the United States.

4. Except as expressly provided herein, all other claims in this action are dismissed as to Sport Graphics, Inc., without prejudice to the United States Olympic Committee seeking further or different relief from any other defendant.

5. Each party shall bear its own costs and attorneys fees.

/s/ [Illigible]
United States District Judge

AGREED

UNITED STATES OLYMPIC COMMITTEE

By /s/ Richard G. Kline
RICHARD G. KLINE
Attorney for Plaintiff
Beveridge, DeGrandi & Kline
1819 H Street, N.W.
Washington, D.C. 20006
(202) 659-2811

AGREED

SPORT GRAPHICS, INC.

By /s/ Branko Stupar
BRANKO STUPAR
Attorney for Defendant Sport
Graphics, Inc.
Faulkner, Shands & Stupar
910 - 16th Street, N.W.
Washington, D.C. 20006
(202) 466-8585

[EXHIBIT A TO DUNLAP DECLARATION]

[See *ante* p. 247]

[Photograph of runners omitted in printing]

Thurs., July 29, 1982

San Francisco Chronicle

Art Rosenbaum

A Victory
For the
Gay Olympics

THE GAY OLYMPICS, to be held in San Francisco August 28-September 5, has already won its first medal. By refusing to vanish, or by just remaining in a holding pattern, it has blunted a threat of legal action from the United States Olympic Committee.

The USOC, and the International O.C., are always annoyed when upstarts try to steal the sacred Olympic word, the five-ring emblem or the Games format including opening and closing ceremonies. "Olympic" is not only an identification, but is a highly saleable word; worldwide TV rights for the 1984 show in Los Angeles will run well above $500 million.

The S.F. Gay Olympics wasn't getting much notice in the straight press until the heavyweights at Colorado Springs, U.S. Olympic headquarters, decided to take it on with a strong letter and a release to the media.

Castro Street was delighted. The G.O. attorney, Mary Dunlap, immediately dispatched a letter citing the First and Fifth Amendments plus a warning that the USOC could be in for another legal skirmish such as the one lost to a group in the East calling itself STOP, for Stop the Olympic Preview.

Nothing more has been heard, or is expected. For the Gay Olympics people, it's good news and bad news. They're happy to overcome an objection to their show; they're sad because they're not getting any national press. Maybe the USOC has decided, wisely, that every knock is a boost in this case. Maybe the USOC expects this annoying gadfly to die a natural death.

The inventor, architect and all-year worker for the Gay Olympics is a medical doctor, Tom Waddell, who finished sixth in the 1968 Olympic Games decathlon, in Mexico City. And here's the shocker (to some). If he had his way, he'd remove the word "Gay" from this competition and the entire community or movement.

"I don't like labels," he explained. "A great many of us want gay returned to it's dictionary meaning—keenly alive and exuberant, having high spirits, being happily excited. But it is difficult to change an impression of the Gay Olympics. I'd like to change it to People's Olympics. Please believe that it will be an athletic competition and a means of self-fulfillment for everyday people doing everyday things."

THE EVERYDAY PEOPLE will number 1600 from 100 American cities and 14 nations, it's claimed. It will be proclaimed Gay Olympics Week and will be held on various municipal grounds in and around San Francisco. Reportedly, a request to use California Memorial Stadium for the opening ceremony was turned down. No reason. Unavailable.

The sponsors and promoters of Gay Olympics plunge ahead, they say, in an effort to change the impression. The entrants will run and jump and throw, striving to succeed. Hot dogs, in the athletic sense and locally, in the gay sense, will not be welcomed.

One wondered out loud, "Suppose a competitor shows up wearing heavy make-up, a wild wig, a skin-tight gown

and high heeled shoes, and makes a play toward the crowd? What then?"

Dr. Waddell sounded firm, "We will have adequate security. That person will be thrown out. There will be nothing suggestive here . . . no flags, no symbols, no graffiti. We will have a strict dress code."

THE GAY OLYMPICS is an open event; that is, anyone of any conviction may enter, provided that person is reasonably qualified to compete. Straights will be there, including at least one 49er. Politicians will be there, for sure . . . there are a lot of votes there.

It is expected The Athletic Congress (replacing the AAU as the power in trackdom) will sanction the Gay Olympics, and regular TAC officials will volunteer their services. Of itself, that would be a coup.

Even a backyard Olympics costs money. Dr. Waddell and friends have motored around the country telling the news to whomever will listen, and most of the media won't. Many fund-raising events have put $100,000 in the treasury, or it was in the treasury until spent for the many necessities.

This is not Olympian in the dollar sense. It won't cost millions or billions. Visiting competitors will stay in private residences. A computer system will match visitors with hosts.

"After all," said Dr. Waddell, "we are a hospitable community."

[EXHIBIT A TO MOTION FOR AWARD OF ATTORNEYS' FEES]

[See *ante* p. 288]

UNITED STATES DISTRICT COURT
E. D. VIRGINIA

No. 82-276-A

UNITED STATES OLYMPIC COMMITTEE

v.

UNION SPORT APPAREL, *et al.*

Decided Jan. 24, 1983

---

* * * *

Bryan, District Judge.

Findings Of Fact And
Conclusions Of Law
Pursuant To Rule 52(A)

Findings of Fact

1. Defendant Union Sport Apparel was in the business of marketing apparel and related accessories, displaying a logo of three interlocking rings displayed with the letters "U.S.A.". [Altshuler dep. at 32-33, Pl. Ex. 55 A & B]

2. Defendant Union Sport Apparel was advised by its attorneys in 1979 "they had some exposure to claims by the Olympic organizations" based on the Olympic Committee's registered mark for clothing, including five interlocking rings, and, further, that "the bottom line on your use of the rings is that it may subject you to suit by the U.S.O.C. • • •" [Altshuler dep. Ex F]

3. Defendant Union Sport Apparel's awareness of the Olympic Committee's rights continued. In April 1980, Union Sport's attorney was advised that the Olympic Committee had already opposed another three-ring design used on appeal. [Altshuler dep. Ex. O] The Trademark Trial and Appeal Board of the U.S. Patent and Trademark Office sustained the Olympic Committee's opposition to registration of the mark. [Pl. L. 59]

4. Defendant Union Sport's attorney was further advised in April 1980 that the Amateur Sports Act "was intended to tighten significantly the rules relating to use by third parties of the Olympic symbols • • •." [Altshuler dep. O]

5. In May 1980, defendant Benjamin Altshuler purchased all of the stock in Union Sport Apparel . [Altshuler dep. at 17-18]

6. On February 12, 1961, defendant Union Sport Apparel assigned to defendant Altshuler "all of its rights and title in and to" the three-ring "U.S.A." logo and the federal applications to register that logo. [Def. Ex. 12, Altshuler dep. Ex. C]

7. On May 29, 1981, defendant Altshuler personally assigned to defendant Umezaki an undivided one-half interest in the Union Sport Apparel three-ring "U.S.A." logo and the attendant applications to register. [Altshuler dep. Ex. C]

8. On June 1, 1981, defendants Altshuler and Umezaki entered into an agreement to market apparel bearing the three-ring "U.S.A." logo. [Altshuler dep. Ex. K]

9. Union Sport Apparel's financier, James Talcott Factors, required defendant Altshuler to make himself personally liable for loans made for the operations of Union Sport Apparel. [Talcott dep. Ex. I-3]

10. James Talcott Factors was under the mistaken impression, at least at one time, that the Union Sport Apparel three-ring "U.S.A." logo was an Olympic mark. [Talcott dep. at H-7, H-8]

11. Defendant Federated Department Stores expressed concern to defendant Union Sport Apparel that the Union Sport Apparel three-ring "U.S.A." logo would conflict with the U.S. Olympic Committee's rights. Defendant Federated proceeded to purchase goods bearing the logo only in light of Union Sport Apparel's agreement of indemnification. [Van Meurs dep. Ex. 2, 3]

12. Defendant Union Sport Apparel made sales of apparel and accessories bearing the three-ring "U.S.A." logo in the following amounts:

13. a. The cost of goods sold for the period June 1979-October 1980 was $1,504,988, or 79% of the total net sales for that period of $1,904,414.

b. The cost of goods sold for the remaining period November 1980-January 1982 is unkown, there being no documents available from which such a figure may be derived. However, multiplying the total net sales for that period of $1,727,377.45 by 79%, an estimated cost of goods sold of $1,364,628.19 is derived from the period November 1980-January 1982.

c. Adding the cost of goods sold for the two periods, an estimated total cost of goods of $2,869,616.19 may be used to calculate gross profits by subtracting that figure from the total net sales of $3,631,791.45.

14. Therefore, using the best data available to the court, the defendants' total gross profits from sale of

products bearing infringing Olympic logos was $762,175.26, derived by subtracting the total cost of goods sold from the total net sales. [3,631,791.45 − 2,869,616 = 762,175.26]

Conclusions of Law

Defendants have Violated The Amateur Sports Act of 1978

1. The Amateur Sports Act of 1978, P.L. 95-606, 92 Stat. 3045, created a new independent cause of action, by which the U.S. Olympic Committee could protect the distinctiveness, value and marketability of its various Olympic designations. [In support of Conclusions 1 through 8, see generally, United States Olympic Committee v. I.F.B.B. et al., Civ. Act. No. 81-969 (D.D.C. Dec. 1, 1982)]

2. The Olympic Symbol protection provision of the Act, 36 U.S.C. § 380, protects the Olympic Committee from any misuse of Olympic designations, or simulations of such designations, regardless of the particular goods or services on which the designates are used. The scope of protection afforded by the Olympic Symbol protection provision is broader than trademark protection, and is more akin to that of an anti-dilution statute.

3. While the Olympic Symbol Protection statute serves some of the same purposes as the Federal Trademark Act, its direct purpose as to benefit the public by ensuring that any use of an Olympic designation is authentic.

4. Subsection (b) of the Olympic symbol protection statute is Congress's recognition, endorsement, and express authorization of the Olympic Committee's corporate participation program. It provides that the Olympic Olympic Committee may authorize its contributors and suppliers to use Olympic designations in advertising that the "contributions, goods, or services were donated, supplied, or furnished to or for the use of, approved, se-

lected, or used by the [Olympic Committee] or United States Olympic or Pan-American team or team members."

5. The use of all Olympic designations has been reserved for the exclusive use of the Olympic Committee. If unauthorized users, such as defendants herein, were allowed to continue the use of any Olympic designations or simulations thereof in connection with their products and services, such misuse would conflict with the Olympic Committee's right to authorize its contributors and suppliers to use Olympic designations in connection with their products and services. Such unauthorized use would frustrate the purpose of subsection (b), and could preclude the Olympic Committee from future expansion of or even continuation of its use of Olympic designations such as the Olympic emblem of "U.S.A." and rings.

6. Defendant's use of Olympic designations and simulations thereof, such as a plurality of interlocking Olympic rings, regardless of number, both with the letters "U.S.A." violates the Olympic symbol protection statute. 36 U.S.C. § 380.

7. Although the Amateur Sports Act created a cause of action independent of the Lanham Act, the Olympic Symbol Protection provision affords the Olympic Committee the same kinds of remedies available under the Lanham Act.

8. In order to effectuate the purposes of the Amateur Sports Act and enable the Olympic Committee to carry out its Congressional mandate, the Olympic Committee should be awarded, in accordance with the remedies provided for in the Act:

a. A permanent injunction preventing all defendants from using any designations or simulations that are confusing similar to the family of related Olympic designations in violation of the Amateur Sports Act.

b. All damages incurred by the Olympic Committee by defendants' acts in violation of the statute, which amount may be trebled.

c. All profits gained by defendants by their acts in violation of the statute.

d. Its costs and attorneys fees in prosecuting this action.

e. An order requiring defendants to deliver up for destruction all labels, signs, prints, packages, wrappers, receptacles, and advertisements in the possession of defendants displaying any Olympic designation or simulations thereof, or any reproduction, counterfeit, copy, or colorable imitation thereof, and all plates, molds, matrices and other means of making the same.

9. Requiring use of the Olympic Committee's funds to enforce the statute against those who might violate 36 U.S.C. § 380, diminishes the amount of funding available to implement the Olympic Committee's athletic programs. The public interest would best be served by having the costs necessary for enforcement of the Olympic Symbol Protection statute be borne by those who violate that statute, rather than by the public's contributions. Particularly where, as here, those expenses were caused by a recalcitrant defendant without a substantial defense. Thus, in order to allow the Olympic Committee to enforce the statute as contemplated by Congress, while at the same time maintaining its development programs, attorneys fees should be granted liberally under the statute. Such an award of attorney fees is particularly appropriate where, as here, the violation has been wilful and with disregard for the Olympic Committee's preemptive rights.

10. Plaintiff's Olympic designations have been used on a wide variety of consumer products. Thus whenever a consumer sees any Olympic designations, or simulations thereof on a product or advertisement, the consumer is

likely to believe that the goods are in some way connected with the Olympic Committee or its Olympic activities. The widespread use and value of plaintiff's Olympic designations "creates the opportunity for others to ride on the goodwill of [the Olympic Committee] in the effort to attract customers to goods and services which may be thought by consumers to be in some way associated with [the Olympic Committee]" James Burrough Ltd., supra, 540 F.2d at 277, 192 USPQ at 564. See also Grotrain, Helfferich, Schulz Th. Steinweg Nachf. v. Steinway & Sons, 523 F.2d 1331, 1342, 186 USPQ 436, 445 (2nd cir. 1975); HMH Publishing Co., Inc. v. Brincat, 504 F.2d 713, 183 USPQ 141 (9th Cir. 1974).

11. Any doubts or close questions are to be resolved against defendants as late-comers who have acted at their own peril in knowingly adopting marks so similar to those of the Olympic Committee. E.g., American Home Products Corp. v. Johnson ChemiCal Co., 589 F.2d 103, 200 USPQ 417 (2nd Cir. 1928); Fotomat v. Cochran, Inc., 437 F.Supp. 1213, 194 USPQ 128 (D.C. Kan. 1977); General Foods Corp. v. Borden Inc., 191 USPQ 674 (N.D. Ill. 1976).

12. Adoption and use by defendants of the marks of interlocking rings displayed with "U.S.A." with full knowledge and awareness of the Olympic Committee's marks, as well as the expressed concern and confusion of defendant Federated Department Stores, among others, when coupled with the defendants' complete freedom to choose any marks, establishes that defendants intended to trade upon the goodwill of the Olympic Committee and of the Olympics. E.g., Stork Restaurant v. Sahati, 166 F.2d 348, 76 USPQ 374 (9th Cir. 1948), Southland Corp. v. Schumbert, 297 F. Supp. 477, 160 USPQ 375 (S.D. Cal. 1968). Indeed, the defendants bear the burden of proving alternative reasons for selection of such similar marks. E.g., Glamorene Products Corp. v. Boyle-Midway, Inc., 188 USPQ 145 (S.D.N.Y. 1975).

13. The infringement of the defendants was willful. Defendants were unjustly enriched by their acts which deliberately appropriated to themselves plaintiff's goodwill. Throughout the period of defendants' sales and marketing activities, they had knowledge of the Olympic Committee's rights. "Whether [they] believed [themselves] to be within the law or not, [they were] knowingly and deliberately cashing in upon the goodwill of the [Olympic Committee]. This is such an infringement as will justify an accounting of profits." Wolfe v. National Lead Co., 272 F.2d 867, 123 USPQ 574, 576 (9th Cir. 1959), cert. den. 362 U.S. 95, 125 USPQ 668.

14. Even if defendants were laboring under a mistaken view of the law that there was no infringement, they nevertheless adopted their marks "for the purpose of taking advantage of the aura of goodwill wich surrounded" the Olymypic designations. Thus an accounting is an appropriate remedy. Maier Brewing Co. supra, Fleischman Distilling Corp., supra. Where the infringement is deliberate and willful, even if the products are non-competitive, both the trademark owner and the buying public are slighted, if the court provides no greater remedy than an injunction. Playboy Enterprises v. Baccarat Clothing Inc., No. 82-5010, 216 USPQ 1083 (9th Cir., Nov. 22, 1982).

15. An accounting of profits should be awarded as a deterrent against future infringements. As the court said in Admiral Corp. v. Price Vacuum Stores, Inc., 141 F. Supp. 596, 801, 109 USPQ 451, 455 (E.D. Pa. 1956).

> It seems scarcely equitable * * * for an infringer to reap the benefits of a trademark he has stolen, force the registrant to the expense and delay of litigation, and then escape payment of damages on the theory that the registration suffered no loss. To impose on the infringer nothing more serious than injunction when he is caught is a tacit invitation to other infringement.

This position was followed by the Ninth Circuit in its economic analysis of the necessity of imposing economic disincentives on infringers, in Playboy Enterprises v. Baccarat Clothing, Inc., supra. In holding failure to award an accounting was an abuse of discretion under the facts of that case, the court observed that an award of only nominal damages could not adequately serve "as a deterrent to future infringing activities." It is, therefore, "essential that the trial courts carefully fashion remedies which will take all the economic incentive out of trademark infringement."

Federal Trademark Act Remedies

A. Plaintiff is Entitled to Injunctive Relief

16. Defendant's continued use of infringing designations will cause irreparable harm to plaintiff. Thus plaintiff is entitled to a permanent injunction, as set forth in this court's previous orders.

B. *Plaintiff is Entitled to Recover Its Damages*

17. Plaintiff is entitled to recover all damages sustained by the wrongful acts of defendants, which amount should be trebled because of the willful nature of defendants' conduct. 15 U.S.C. § 1117. Plaintiff, however, has not attempted to show evidence of damages aside from the statutory measure of defendants' profits.

C. *Plaintiff Should Be Awarded An Accounting of Defendants' Profits*

18. An accounting of an infringer's profits should be granted if the infringer is unjustly enriched, if the trademark owner sustained damages from the infringement, or if an accounting is necessary as a deterrent to future infringements. W. E. Basset Co. v. Revelon, Inc., 435 F.2d 656, 664, 168 USPQ (—— 2nd Cir. 1970). Monsanto Chemical Co. v. Perfect Fit Products Mfg. Co.,

349 F.2d 489, 146 USPQ 512 (2nd Cir. 1965); Maier Brewing Co. v. Fleischman Distilling Corp., 390 F.2d 147, 157 USPQ 76 (9th Cir.), cert. den. 391 U.S. 966, 157 USPQ 720 (1968); Matuna Corp. v. Cawy Bottling Co., Inc., 613 F.2d 582, 205 USPQ 489 (5th Cir. 1980); Truck Equipment Service Co. v. Freuhauf Corp., 536 F.2d 1210, 191 USPQ 79 (8th Cir. 1976).

19. Defendant's wrongful profits may be measured prima facie by establishing the amount of sales. The burden then shifts to the infringer to prove its operating costs. (15 U.S.C. § 1117).

20. Defendants' wrongful profits also may be measured alternatively by the amount of money that would have been charged by plaintiff for the authorized association of goods in the categories of defendants' goods, since this is the amount which defendants, by their infringement, have saved. Deering, Milliken & Co. v. Gilbert, 269 F.2d 191, 122 USPQ 355 (2d Cir. 1959).

D. *Plaintiff is Entitled to Recover Its Attorneys' Fees*

21. In view of the willful infringement by defendants, as well as having required plaintiff to go to considerable expense to protect its statutory rights despite the failure to put forth a credible defense, this is an exceptional case within the meaning of 15 U.S.C. § 1117 as incorporated by the Amateur Sports Act of 1978 (36 U.S.C. § 380(a)) and plaintiff is entitled to recover from the defendants its costs and attorneys fees incurred in prosecuting this action.

[EXHIBIT A TO WADDELL DECLARATION]

[See *ante* p. 310]

TRIUMPH IN 86

Vol. 1 No. 1

[THREE-RING LOGOS]

A TRIBUTE TO GAY GAMES I
THE PROMISE OF TRIUMPH '86
GAY GAMES II

* * * *

The Logo

The Overlapping Circles:

* * * *

January 1984

* * * *

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* * * *

Editorial

THE PROMISE OF '86

IT IS NOW FOURTEEN MONTHS SINCE Gay Games I and our recovery from them is nearly complete. We are ready to begin plans for Gay Games II in 1986.

There is much to be said about the first Games, but if you were there then you know how inadequate words and pictures would be in describing what we all saw and felt.

Here in our first sound since Gay Games I, we present you with the commemorative first issue of our new magazine which we call "TRIUMPH". In it you will find pictures and words in tribute to our historic moment together, but more important, you will find the promise of Gay Games II in 1986. They will be held once more, and for the last time in the foreseeable future, in San Francisco.

Our decision to host them a second time comes from our desire to refine them and work out the "bugs" before they travel to other international sites. We wish to emphasize the same philosophy of participation in Gay Games I, as the hallmark of Gay Games II. Our goals remain the same: here is an opportunity for us to gather together from all over the world in a spirit of friendly competition.

In celebrating our togetherness in such a fashion, we choose cooperation rather than confrontation to establish our visibility and identity. In turn we create visual examples of how we hold ourselves and this serves to educate those who need to know us better.

As in Gay Games I, we will address the same issues that plague ALL communities: sexism, racism, and ageism. In addition we will continue to keep the Games open for all who wish to participate regardless of their ability or geography. The concept of the Games centers around the notion of inclusion rather than exclusion.

There are many new lesbian and gay sports festivals around the world where the competition is good and the spirit is high towards winning. But, once every four years the Gay Games will be the opportunity for everyone to be together at the same time to share and to play and to discover and to celebrate our accomplishments. May our cheers and tears of joy be noticed throughout the world.

So, we begin again. In many ways it will be more difficult the second time because now there will be expectations that did not exist for Gay Games I. Please be mindful that we need support from everyone. Help us and yourself to make "TRIUMPH" IN '86 unforgettable.

Dr. Tom Waddell

* * * *

THE "OLD" BOARD AND ITS MANDATE

IT'S ALL HISTORY FOLKS! THE FIRST Gay Games were an astounding success in terms of establishing credibility of international athletics for lesbians and gay men. It was perpetrated by a small band of die-hard visionaries and volunteers. Without their dedication to that task, the Games would still be struggling as an idea. But they did it! And now we all reap the benefits of those incredible experiences. Congratulations to the *"Old Board"*, you have etched your names in our history in a way that can only be described in the most positive and enlightening ways.

* * * *

Twin Cities to Host 1986 Lesbian/Gay Winter Olympic Games

A FULL COMPLEMENT OF EVENTS IS BEING offered in Minneapolis/St. Paul for the First Lesbian/Gay Winter Olympic Games in 1986.

Organizers of the event are in the process of preparing Twin Cities for the enormous undertaking and welcome inquiries to the competitive and associated cultural events.

For further information, please write to:

ML/GC-IGOA
West Seventh Neighborhood Center
900 Albion St.
St. Paul, Minnesota 55116

* * * *

OPENING CEREMONIES MORE THAN A DREAM

* * * *

And then the athletes.

No one was quite prepared for the monitors in blue Gay Games I shirts and white pants carrying signs from 12 countries, 27 states and 179 cities and towns with a seemingly endless procession of 1300 women and men in their colorful team uniforms.

* * * *

Acting Mayor Doris Ward welcomed the guests to the Gay "Olympic" Games. The late Congressman Phil Burton issued a warning to the United States Olympic Committee and then presented a congressional award to the Games organizers. Games Chairman Dr. Tom Waddell confirmed that this was the beginning—and it was.

The athletes then crowded around the stage to watch and listen to Tina Turner do a stunning 45 minutes of what she does best to the dancing delight of everyone in the stadium.

Then the athletes, monitors, and flag corps took positions on the field in the form of a giant gauntlet. They all settled to one knee and suddenly Meg Christian began singing the haunting Gay Games official anthem "Reach for the Sky" to an upbeat accompaniment. As she sang,

two former Olympic stars, Susan McGrievy and George Frenn, entered the west gate carrying the torch which had made its way across country from Stonewall in New York City, carried by more than 200 gay women and men.

The torch bearers ascended the flame plinth and as Meg finished with a crescendo, they lighted the flame signifying the start of the First Gay Games.

• • • •

Gay Games International Advisory Committee to be Formed

THE GAY GAMES MOVEMENT IS IN rapid evolution from a somewhat amorphous festival to a significant event in all our lives every four years. This vast potential for global unity and its consequent social impact cannot be fully realized without the emergence and participation of leaders with the qualities of courage, vision and integrity, within the international gay community. It is crucial that future Games reflect the consensus of such leaders concerning the ideology and objectives of the Games.

Future Gay Games should also reflect a broad base of agreement about such issues as events to be held, procedures for choosing host cities, and criteria for selecting athletes beyond the traditional yardsticks of competitive success.

To facilitate the process of achieving global consensus about these questions, it is essential to set up an international committee whose members will provide valuable input on issues relevant to the future evolution of the Games.

In many cities throughout the world, leaders motivated and competent to participate in such a committee will already be known or identifiable. The Board of Di-

rectors of San Francisco Arts & Athletics welcomes a word of interest from such persons so that constructive dialogue can begin well in advance of the Opening Ceremonies of Gay Games II.

Please forward all correspondence on these matters to the

EXECUTIVE DIRECTOR
San Francisco Arts & Athletics, Inc.
890 Hayes St.
San Francisco, CA 94117
USA

• • • •

Dear Friends of
Gay Games II,

Now it is time to begin building our Triumph in '86. It is important that we have your support at this time, during the first development stage of a long, arduous project. Gay Games I were held at a cost of $400,000 and that included the volunteer work of hundreds and a phenomenal fund-raising effort, primarily at the local level. Gay Games II will have a budget that is magnitudes larger.

Our Board of Directors for Gay Games II has raised the initial $25,000 start-up budget among ourselves—now we have to turn to our total community—nationally and internationally—for the financial support needed for Gay Games II.

All of us who believe in the beauty and magic of the Games can help by subscribing to our magazine and by making personal and business contributions. In addition we have launched a fundraising campaign in the form of a Sweepstakes. A $2 donation is requested for each ticket which offers a chance for the remarkable prize of:

TWO (2) $200 Seats for
Los Angeles Games 1984
Opening Ceremonies, July 28th

—plus—

Roundtrip Airfare for 2

—plus—

Accommodations in LA for 2

We come to you for your support and we hope you will respond—generously. The Games will once again be a mighty showcase of our collective self-esteem. With you joining us we will achieve our goal of TRIUMPH in '86.

Board of Directors
Gay Games II

Please remember that your donation is tax-deductible. S.F.A.A. is classified by the IRS as a 501(c)3 organization and gifts are considered a charitable contribution to a public benefit organization.

[EXHIBIT B TO WADDELL DECLARATION]

[See *ante* p. 311]

[Logo with three rings omitted in printing]

SACRAMENTO
1984 CALIFORNIA POLICE OLYMPICS
JUNE 19TH THROUGH JUNE 24TH
1984

SACRAMENTO
CALIFORNIA

• • • •

(5)

Supreme Court, U.S.
FILED
DEC 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-270

In the Supreme Court of the United States

OCTOBER TERM, 1986

SAN FRANCISCO ARTS & ATHLETICS, INC. and THOMAS F. WADDELL, M.D.,
Petitioners,

vs.

UNITED STATES OLYMPIC COMMITTEE and INTERNATIONAL OLYMPIC COMMITTEE,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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4 1 PP

QUESTIONS PRESENTED

1. In enacting the "Amateur Sports Act of 1978," 36 U.S. Code sections 371 et seq., did Congress intend to bestow upon the United States Olympic committee (below, "USOC") an exclusive authority to prohibit and enjoin virtually any and every use of the word "Olympic"?

2. Are the well-established tenets of trademark law that generic terms cannot be trademarks and that a party may use an otherwise incontestable trademark fairly to describe its goods or services rooted in First Amendment considerations of preserving freedom of speech and protecting the richness of the human vocabulary against claims of private ownership?

3. Given that USOC was created and chartered by Congress to perform a public function, and given that USOC receives and uses substantial public resources to that end, is USOC engaged in "state action" such that it may not violate the First and Fourteenth Amendments by selecting among diverse potential users of the word "Olympic," based upon speech-suppressing and invidiously discriminatory motives?

4. Can an injunction prohibiting use of "Olympic" by a nonprofit corporation that is tangentially engaged in raising money for its cause be reconciled with trademark infringement and commercial speech precedents that require balancing of the governmental interests in regulating fraudulent commercial speech against free speech interests?

5. If the Amateur Sports Act of 1978 settled nothing more or less than incontestable trademark upon USOC as to the word "Olympic," should that trademark be enforced according to the standard of proof and defenses to trademark infringement, as well as the standard for awarding attorneys' fees, developed over forty years of litigation under the Trademark Act of 1946?

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No. 86-270

In the Supreme Court of the United States

OCTOBER TERM, 1986

SAN FRANCISCO ARTS & ATHLETICS, INC. and THOMAS F. WADDELL, M.D.,
Petitioners,

vs.

UNITED STATES OLYMPIC COMMITTEE and INTERNATIONAL OLYMPIC COMMITTEE,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals affirming the summary judgment and the permanent injunction, and reversing and remanding the award of attorneys fees, is reported at 781 F.2d 733 (9th Cir. 1986), and it is presented to this Court in the Petition for Certiorari, (below, "P.Cert."), Appendix (below, "App.") 1, pp. 1-24. The order amending that opinion, denying rehearing and rejecting the suggestion of *en banc* review, is reported at 789 F.2d 1319 (9th Cir. 1986)(P.Cert., App.2, pp.25-27). The opinion dissenting from denial of *en banc* review of that opinion is reported at 789 F.2d 1320 (9th Cir., 1986)(P.Cert., App.3, pp.28-59.) The order of the U.S. District Court granting summary judgment was not accompanied by a

written opinion. The transcript of hearing in which the District Court determined to grant summary judgment is presented in the second volume (below, "II") of the Joint Appendix (below, "J.A."), at pp. 258-272; and the oral order granting summary judgment is excerpted in P.Cert., App. 4, pp.60-66. The written opinion of the U.S. District Court granting an award of attorneys' fees to respondents USOC and IOC is unreported (P.Cert., App.5, pp.67-76.) The opinion of the Court of Appeals for the Ninth Circuit affirming the preliminary injunction to USOC and IOC was not reported (P.Cert., App. 7, pp.81-90.) The opinion of the U.S. District Court issued upon grant of the preliminary injunction is reported at 219 U.S.Pat.Q. 983 (N.D. Cal. 1982)(P.Cert., App. 8, pp.91-127.)

JURISDICTION

The opinion of the U.S. Court of Appeals for the Ninth Circuit deciding the merits of this action was issued on January 27, 1986. That opinion was amended on May 22, 1986, upon the Court of Appeals' denial of rehearing and rejection of a suggestion for *en banc* review; a timely petition for rehearing, suggesting *en banc* review, was filed by petitioners San Francisco Arts & Athletics Inc. and Dr. Waddell (below, "SFA&A" and "Waddell") on February 10, 1986. The mandate was stayed by the U.S. Court of Appeals for the Ninth Circuit for ninety (90) days from May 22, 1986, the date of denial of rehearing, to enable SFA&A to file a petition for writ of certiorari in this Court. The petition for certiorari was filed within ninety (90) days of May 22, 1986, on August 19, 1986. This Court's jurisdiction is invoked under 28 U.S. Code section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., Amend. I:

"Congress shall make no law . . . abridging the freedom of speech . . .". (1791)

U.S. Const., Amend. XIV:

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

"Amateur Sports Act of 1978," P.L. 95-606, sec.1(b); 92 Stat. 3048; 36 U.S. Code section 380:

Without the consent of the Corporation [United States Olympic Committee] any person who uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition—

(1) the symbol of the International Olympic Committee, consisting of 5 interlocking rings;

(2) the emblem of the . . .[USOC], consisting of an escutcheon having a blue chief and vertically extending red and white bars on the base with 5 interlocking rings displayed on the chief;

(3) any trademark, trade name, sign, symbol, or insignia falsely representing association with, or authorization by, the International Olympic Committee or . . .[USOC]; or

(4) the words "Olympic," "Olympiad," "Citius Altius Fortius," or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with . . . [USOC] or any Olympic activity;

shall be subject to suit in a civil action by . . . [USOC] for the remedies provided in the Act of July 5, 1946 (60 Stat. 427; popularly known as the Trademark Act of 1946). However, any person who actually used the emblem in subsection (a)(2) of this section, or the words, or any combination thereof, in subsection (a)(4) of this section for any lawful purpose prior to September 21, 1950, shall not be prohibited by this section from continuing such lawful use for the same purpose and for the same goods or services. In addition, any person who actually used, or whose assignor actually used, any other trademark, trade name, sign, symbol, or insignia described in

subsection (a)(3) and (4) of this section for any lawful purpose prior to enactment of this chapter shall not be prohibited by this section from continuing such lawful use for the same purpose and for the same goods or services.

(b) . . . [USOC] may authorize contributors and suppliers of goods and services to use the trade name of the Corporation as well as any trademark, symbol, insignia, or emblem of the International Olympic Committee or of the Corporation in advertising that the contributions, goods, or services were donated, supplied, or furnished to or for the use of, approved, selected, or used by . . . [USOC] or United States Olympic or Pan-American team or team members.

(c) The Corporation shall have exclusive right to use the name "United States Olympic Committee"; the symbol described in subsection (a)(1) of this section; the emblem described in subsection (a)(2) of this section; and the words "Olympic," "Olympiad," "Citius Altius Fortius" or any combination thereof subject to the preexisting rights described in subsection (a) of this section.

STATEMENT OF THE CASE

The focal point of this controversy is the meaning of 36 U.S. Code section 380, quoted immediately above, as it applies to the use of the word "Olympic" by petitioners, who are a corporation named "San Francisco Arts & Athletics Inc." ("SFA&A"), and one of its chief founders and officers, Dr. Thomas Waddell ("Waddell"). Section 380 is part of a statute enacted by Congress in 1978 that bestows an array of powers and responsibilities upon respondent, United States Olympic Committee ("USOC"), in the governance and management of U.S. amateur athletics and the participation of U.S. amateur athletes in contests including the Pan American Games and the Olympic Games. Pub.L. 95-606; 92 Stat. 3045 et seq.; 36 U.S. Code section 371 et seq.

In 1981, SFA&A began plans to stage a "Gay Olympic Games" to occur in autumn 1982, in San Francisco, California. (J.A. I-92) SFA&A is a California nonprofit

corporation (Record at Docket # ("R.") 18 at Exhibit ("Ex.") CC thereof). SFA&A's charter purpose is to "educate the general public on the vitality, variety and versatility of the gay movement." (R. 18 at Ex. DD; J.A.I-102) In the words of petitioner Waddell, the purposes of SFA&A's "Gay Olympic Games" were: to "but provide a healthy recreational alternative to a suppressed minority," to wit., those of gay/lesbian sexual orientation, to "educate the public at large towards a more reasonable characterization of gay men and women," and to "attempt, through athletics, to bring about a positive and gradual assimilation of gay men and women, as well as ... non-gays, and to diminish the ageist, sexist and racist divisiveness existing in all communities regardless of sexual orientation." (J.A.I-93) By the plans of SFA&A's organizers and volunteers, this political and philosophical desideratum is to be implemented by the staging of a quadrennial athletic competition, starting in 1982 and continuing indefinitely, international in outreach, "Olympic" in "format" (J.A.I-93) and nonprofit and non-commercial in principle and in operation (J.A.I-93-99, 102, 104), "to bring people together for greater understanding and physical fitness and not for the purpose of establishing one group being better than any other" (J.A.I-94).

In mid-year 1981, the founders of SFA&A sought to incorporate a nonprofit organization using the name "Golden Gate Olympic Association," and they were told that the word "Olympic" could not be used in a corporate title. (J.A.I-95) Then re-naming the corporation "San Francisco Arts & Athletics Inc.", the founders proceeded to plan and promote a "Gay Olympic Games," set to occur in autumn 1982, in the "belief" that they could use the word "Olympic" "to describe one of the events we intended to sponsor, i.e. the 'Gay Olympic Games'." (J.A.I-95).

In promoting the "Gay Olympic Games," and in creating and selling items to finance it, SFA&A, Waddell and those associated with them did not at any time use any trademark, trade name, sign, symbol, emblem or insignia mentioned in

36 U.S. Code section 380, other than the words "Olympic" and "Olympics"; SFA&A and its participants used the words "Olympic" and "Olympics" only in clear, open and repeated combination and association with the word "Gay" (J.A.I-100, 115; R.17 at Ex.'s A-E, G-U, BB-DD, II, JJ). SFA&A's purposes in using the words "Olympic" and "Olympics" included: to convey the format of the Gay Games, to "best describe [SFA&A's] undertaking" which seeks "peace, friendship and positive social interaction [for the same reasons] as the Police and Fireman, Armenians, Senior Citizens, Handicapped and Youngsters all enjoy their own separate 'Olympics'" (J.A.I-95, 99), and to identify the activity of an athletic competition, in its "Greek" and "dictionary" senses (J.A.I-115).

Upon being told, by a person involved in amateur athletics in mid-December 1981, that SFA&A "may be in trouble" relative to use of "Olympic," Waddell called an employee of USOC in the public relations department at Olympic House. That employee told Waddell to write a letter to USOC requesting permission to use "Olympic"; that employee also told Waddell that it is "generally just a formality because the USOC could not go about taking court action on everyone who uses the word 'Olympic' ". (J.A.I-95) Waddell wrote such a letter to USOC on December 26, 1981. (R.6 at Ex.'s B and C; (J.A.I-33).

From December 1981 through February 1982, a number of communications including telephone calls and letters were exchanged between the parties to this litigation and among their attorneys concerning SFA&A's use of the word "Olympic" in connection with the planned Gay Olympic Games. (R. 5, at Ex.s' A-D; R. 6, at Ex.s' A-H; R.17 at Ex.'s A-E; J.A. I-30-31, 33-35). In this litigation, USOC argues that during this communication Waddell conceded that SFA&A would permanently agree that it would not use "Olympic"; SFA&A claims otherwise. (J.A.I-34-35, 96, 169) A few days after Waddell wrote a letter that USOC claims established Waddell's agreement not to use "Olympic" (J.A.I

96; R.17 at Ex. C), Waddell wrote again to USOC, asserting a right to use "Olympic," and within a few more days an attorney for SFA&A and Waddell wrote, asserting the Gay Games' organizers had a constitutional right to use "Olympic" and offering to place a disclaimer, "not associated with the U.S. Olympic Committee ," on all Gay Games paraphernalia and literature; USOC rejected that offer. (J.A.I-30; R.5 at Ex.s' A-D) The District Judge who granted the preliminary injunction in this case characterized these communications thusly: "each party was under the impression that it had forced its wishes upon the other party and that each had achieved its respective goals." (P.Cert.App.8, p.101).

In any event, it is undisputed that from February 1982 until enjoined from doing so in August 1982, SFA&A sponsored and promoted the "Gay Olympic Games," openly using the word "Olympic," just as SFA&A's attorney had told USOC's attorney in writing that SFA&A would do; USOC claimed to be unaware of the resumed use of "Olympic" by SFA&A until June 1982. (J.A.I-31-35, 97; R.5 at Ex.s' A-D) On August 9, 1982, on the eve of commencement of what were to be the "Gay Olympic Games," USOC and IOC brought this federal civil action against SFA&A and Waddell, and immediately sought and secured a temporary restraining order against use of the word "Olympic" in conjunction with the Gay Games. (J.A.I-5-56; text of the temporary restraining order is at J.A.I-39-40).

As of August 1982, when USOC and IOC sued SFA&A and Waddell and secured injunctive relief prohibiting their use of the word "Olympic" in conjuction with promotion of the "Gay Games," an undetermined number of athletic competitions as well as hundreds of business organizations existed in the United States that were identified by the words "Olympic" and/or "Olympics," in combination with other words and phrases. (R. 13 at Ex. B; R. 17 at App. I and Ex.s' BB, EE, F and unmarked exhibits submitted at hearing on August 19, 1982 (R. in undesignated envelope)); J.A.I-89, 93, 99, 143; P.Cert., App.3 at n.4, pp.56-58). The record in this

case establishes that as of August 1982, when USOC succeeded in enjoining SFA&A from using "Olympic" to name and identify its athletic games, and upon its paraphernalia, including items such as t-shirts, buttons, posters and the like that were to be sold to help meet the expenses of the non-profit corporation incurred in staging the Gay Games, an array of theatrical and/or athletic performances and competitions using "Olympic" in their titles had occurred in the United States in recent months and years, including: International Police Olympics; Armenian Olympics; Olympic of Ballet; Olympics of the Mind; Senior Olympics; Golden Olympics; Firemens Olympics; United States Skill Olympics; Virginia Golden Olympics; Wrist-Wrestling Olympics; Crab-Cooking Olympics; Dog Olympics; Nude Olympics; Rat Olympics; WackyOlympics; Xerox Olympics; Alcoholic Olympics. (J.A. I-93, 97; R.17 at App. A and Ex.s' BB, EE).

As of August 1982 when it sued SFA&A and Waddell, USOC claimed to have formally consented to use of "Olympic" solely in conjunction with promotion of athletic competitions in behalf of mentally disabled persons ("Special Olympics") and youth ("Junior Olympics" and "Explorer Olympics"). (J.A. I-33, 132-133). In the record in the instant litigation, USOC denied consenting to the use of "Olympic" by others staging athletic competitions, and it specifically denied consenting to the "International Police Olympics" staged in the U.S. by police. At the hearing on the motion for preliminary injunction in August 1982, one of USOC's attorneys represented to the District Court, in support of USOC's motion for preliminary injunction, that while USOC had not sued the police athletic organizers, there were "negotiations" in progress with "the Police Olympics people" regarding their use of "Olympic." (U.A.I-143-144).

Yet, as of May, 1984, the record establishes without ambiguity and without contradiction that "[p]olice continue[d] to stage and publicize an annual 'Olympics'", of which USOC was aware, using a five(5)-ring symbol (of

which two (2) rings are handcuffs) as well as the word "Olympics" in the promotional materials. (J.A.II-310-311; R.106 at Ex. B). Other record evidence in this action also contradicts the denial of USOC's attorney that it consented to the "Police Olympics," and indicates that USOC had consented to use of "Olympic" by police to promote an annual, international athletic competition in the United States. As of March 1982, the International Olympic Committee ("IOC") by its Director, Monique Berlioux, stated in writing that USOC's "consent" to uses of "Olympic" "is not unreasonably withheld," and indicated that USOC's consent had been given to uses of the word "Olympics" by "the mentally retarded and police officers." (J.A. II-250-252). Other than the assertion by USOC's attorney in support of the motion for preliminary injunction in August 1982, concerning alleged "negotiations" of USOC with "the Police Olympics" people (J.A. I-144), the record in the instant case contains not a hint of any legal action actually taken by USOC to prevent use of the word "Olympic" by promoters of the "International Police Olympics," an athletic competition that has been staged with USOC's knowledge since at least August 1982. (J.A. I-100; I-143-144).

While USOC claimed by its attorneys to have brought legal actions against use of "Olympic" to promote athletic competitions other than the Gay Games, the legal actions USOC cited as of August 1982 were not suits against nonprofit promoters of athletic competitions seeking to use "Olympic" outside trade; rather, they were actions to prevent competing registrations of "Olympic" as a trademark, disputes with organizations affiliated with USOC, and litigation against commercial corporations purchasing USOC's trademarked goods. (J.A.I-57-58, J.A.II-216-217; R.11 at Ex.s' K-M; R.72 at Ex.'s N-R) The only other civil suit shown of record that was brought by USOC against a nonprofit organization not affiliated with USOC, for promoting a competition as an "Olympics," other than the instant one, was filed by USOC against the March of Dimes

Birth Defects Foundation, *after* USOC's suit against SFA&A, and *after* SFA&A counterclaimed that USOC was using its power as to "Olympic" censoriously and discriminatorily, to prevent only those "Olympics" of which it disapproved, such as the "Gay Olympics." (J.A.I-173-176; J.A.II-217; R.72 at Exhibit O thereof).

Meanwhile, immediately after issuance of the t.r.o. against SFA&A's use of "Olympic" in August 1982, SFA&A by its volunteers acted rapidly and diligently to obey the t.r.o., issued approximately two (2) weeks before commencement of what was to have been the "Gay Olympic Games." Volunteers for SFA&A spent days excising the offending word from t-shirts, buttons, posters and other paraphernalia, as well as from literature of the organization, cancelling orders for merchandise containing the offending word, "Olympic," changing orders for printed matter, removing the word from their vocabularies insofar as inquiries and telephone calls about the upcoming Gay Games were concerned, dealing with the belief stemming from the suit and injunction that the event itself had been enjoined and/or cancelled, advising business owners including gay community media representatives not to use "Olympic" in conjunction with articles and physical property associated with the event, and, in general, meticulously conforming to the prohibition of use of "Olympic" placed upon them by the terms of the t.r.o. and the preliminary injunction. (J.A.I-88-92, 94, 95, 101, 102, 105, 107, 109, 110-111, 112, 114, 115) (The t.r.o. appears at J.A.I-39; the preliminary injunction appears at J.A.I-163).

While petitioners and those associated with them obeyed the injunctive orders, they averred in sworn declarations that they felt "fear. . . as to the consequences to them and others if there are any errors in interpreting and obeying the order" (J.A.I-88), that "[t]o have the TRO on us is like cutting off my soul. . .[and] hurts beyond belief" (J.A.I-91, 92), that they were "upset that the U.S.O.C. has decided to discriminate" (J.A.I-90), that "the 'Gay Olympic Games' are being

selectively prosecuted" (J.A.I-9), that there was "extreme disruption of our organizational efforts" (J.A.I-105), and that "I personally am singled out because I am helping with these Gay Games" (J.A.I-115). Efforts by SFA&A's attorneys failed to persuade the issuing court that the t.r.o. and preliminary injunction were unconstitutionally discriminatory, censorious, and prohibitive of protected speech; likewise, a motion for stay of the preliminary injunction was urged in behalf of SFA&A to the U.S. District Court and the U.S. Court of Appeals for the Ninth Circuit, and it was denied at both levels (J.A.I-48-52, 69-89, 136-140, 147-162).

In September, 1983, after prevailing in the securing of preliminary innunctive relief and in the appeal by SFA&A from that order, USOC and IOC moved for summary judgment and a permanent injunction, *solely* as to their claim that petitioners' use of "Olympic" violated USOC's rights under section 380 of the Amateur Sports Act. (J.A.II 208-218; P.Cert., App.4, pp.62-66, App.6, pp.77-80) In their original complaint, in addition to the section 380 claim, USOC and IOC had pleaded six other causes of action against SFA&A and Waddell; those other causes claimed trademark infringement and unfair competition pursuant to the Lanham Act, violation of USOC's exclusive jurisdiction as to amateur athletics pursuant to the Amateur Sports Act, false designation of origin, false description or representation pursuant to the Lanham Act, breach of contract, and dilution under California law (J.A.I-7-10, 11-14). Other than the claim under section 380, after the complaint was filed these claims "were not subsequently pressed, and are no longer in the case." (J.A.I-7-10, 11-14; P.Cert., App.1, p.2)

SFA&A and Waddell opposed the motion for summary judgment, citing the declarations filed in opposition to the motion for preliminary injunction, as well as filing a further declaration on the subject of USOC's intentionally discriminatory treatment of SFA&A, shown by contrast with USOC's permission of "Olympics" by police and disabled persons, to establish that USOC was not entitled to summary

judgment. (J.A.II-226-252). SFA&A and Waddell contended that triable disputes of material fact were presented on the record, including: (1) whether SFA&A and Waddell had used "Olympic" in a manner "tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with [USOC] or any Olympic activity," 36 U.S.Code section 380(a)(4); (2) whether Waddell intended "to sever the Gay Games from their direct connection with the gay community altogether," which Waddell had denied (J.A.II-219-220; R.74 and Ex.B thereof), and whether SFA&A's and Waddell's intent in using "Olympic" was to invoke a politically and philosophically powerful word, distinct from USOC and any Olympic activities, or to confuse the public as to some purported relationship between SFA&A and USOC or the Olympics; (3) whether SFA&A's use of "Olympic" was defensible as "fair use in descrption," permissible under the Lanham Act, 15 U.S. Code section 1115(b)(4); (4) whether USOC was engaged in state action, rendering its treatment of SFA&A and Waddell subject to constitutional guarantees of equal protection and freedoms of speech and association; (5) whether SFA&A's use of "Olympic" was ideological or commercial speech; (6) whether USOC discriminated against SFA&A relative to other nonprofit and popular stagers of "Olympic" competitions, and, (7) assuming *arguendo* that SFA&A and Waddell had violated USOC's rights, whether an injunction was necessary, given that SFA&A and Waddell had agreed to use a disclaimer, "not associated with [USOC]," in conjunction with any use of "Olympic" (J.A.II-226-246). SFA&A contended that these triable disputes of material fact arose from USOC's complaint and their counterclaims against USOC, and that the existence of these triable disputes precluded summary judgment to USOC. (J.A.II-226-246, 261-268).

The U.S. District Court granted summary judgment and a permanent injunction to USOC, ruling *inter alia* that: there were no triable disputes of material fact in that USOC did not have to prove any "tendency to confuse" as to SFA&A's

use of "Olympic" because any use of "Olympic" in conjunction with promotion of an athletic contest violates section 380; the Lanham Act defenses, including "fair use in description" do not apply to USOC's suits under section 380; USOC is not a governmental actor, and thus no violations of constitutional guarantees were committed by USOC's conduct; and, an injunction was necessary. (J.A.II-270-271)

After prevailing on the merits without a trial, USOC and IOC moved for an award of attorneys' fees, contending that the District Court could award fees to them in its "discretion" and that, even if the Lanham Act requirements that attorneys fees be awarded only in exceptional cases, where the infringement was willful, deliberate, fraudulent or malicious, SFA&A and Waddell were willful trademark infringers. (J.A.II-275-287) In conjunction with that motion, USOC argued that SFA&A and Waddell had used "Olympic" with intent to infringe USOC's trademark. (J.A.II-280-284)

In that motion for attorneys' fees, for the first time USOC also contended that SFA&A, Waddell and others associated with them had engaged in "willful misconduct" and a "contemptuous...act" in "direct violation of this Court's preliminary injunction" (J.A.II-285), by printing an item in an SFA&A publication that contained the language, "1986 Lesbian/Gay Winter Olympic Games" and by permitting two former International Olympics participants to wear their official Olympic sweatshirts, which bear the escutcheon of USOC, 36 U.S. Code Section 380(a)(2), when these persons lit a flame at the opening of the Gay Games in San Francisco in 1982. (J.A.II-285, 288 at para. 4; R.97 at Ex. A). SFA&A and Waddell factually countered these accusations of contemptuous violation of the injunctive orders, showing them to be highly distorted and misleading in nature (J.A.II-302-305, 308-310; R.105 and 106, and Ex. A thereof.)

Even so, the District Court apparently gave some credence to USOC's agrument that SFA&A and Waddell had "subsequently picked up the name 'Olympic' again" after being enjoined from doing so. (J.A.II-338-339) Based in significant

part upon declarations by USOC's attorneys that were filed at the time for reply, after SFA&A's opposition to the motion for attorneys fees had been submitted (J.A.II-318-328), the District Court awarded $96,600.00 in attorneys fees to USOC, holding that SFA&A and Waddell were willful trademark infringers, that their constitutional defenses were irrelevant to the award of fees against them, and that "[a]n award of attorneys fees in this case also promotes the goals of the Amateur Sports Act." (P.Cert., App.4, pp.67-76)

On January 27, 1986, the U.S. Court of Appeals for the Ninth Circuit affirmed the grant of summary judgment and of a permanent injunction in favor of USOC and IOC, but reversed and remanded the award of attorneys' fees made by the District Court. (P.Cert., App.1, pp.1-24) The Court of Appeals' opinion on the merits concluded generally: that it is unnecessary for USOC to prove tendency to confuse in order to prevail under section 380(a)(4); that the defenses to trademark infringement developed under the Lanham Act, including "fair use in description," do not apply under section 380; that because USOC is not a governmental actor, there need be no determination of the "difficult issue of the applicability of equal protection" nor of the factual question as to USOC's alleged discrimination; that because "the word 'Olympic' [is] . . . essentially property," USOC can enjoin the Gay games' organizers' use of "Olympic" without violating First Amendment rights; and that "while a declaratory judgment might have sufficed, providing injunctive relief was not, given SFAA's past use of the protected word and symbols, an abuse of discretion." (P.Cert., App.1, pp.1-15) On the question of attorneys' fees, the Court of Appeals remanded for the District Court to determine whether SFA&A's and Waddell's conduct was sufficiently "exceptional" to justify the award, and, if so, to determine whether the fees requested are reasonable, given "the rather impressive amount of time accumulated on this case" by USOC's and IOC's attorneys. (P.Cert., App.1, pp.15-24)

On May 22, 1986, the Court of Appeals rejected SFA&A's

petition for rehearing and suggestion of *en banc* review, and the panel deciding the case amended its opinion concerning the issue of state action. (P. Cert., App.2, pp.25-27) On May 28, 1986 an opinion of three judges of the Court of Appeals was issued, dissenting from the denial of *en banc* review. (P.Cert., App.3) In that opinion, the dissenting judges reasoned that "...when cut loose from their conceptual moorings, intellectual property rights can raise serious constitutional concerns", (P.Cert., App.3, p.38), and the USOC's "stewardship over the word Olympic" appears to have been exercised against the Gay Olympic Games' promoters "pursuant to a subjective assessment of the wholesomeness of the proposed speaker or propriety of the proposed message" (P.Cert., App.3, pp.40-41). Accordingly, the dissenters urged that the "serious constitutional concerns" raised by the appellate panel's opinion on the merits, and the "blunderbuss injunction entered against SFAA", should have received *en blanc* review. (P.Cert., App.3, pp.47-52) On August 19, 1986, SFA&A and Waddell petitioned this Court for certiorari to review the decision of the U.S. Court of Appeals for the Ninth Circuit, and, on October 20, 1986, this Court granted the writ of certiorari.

SUMMARY OF ARGUMENT

It is beyond dispute that, in the United States today, there are many and various users of the word, "Olympic," including both primarily commercial enterprises and basically non-commercial ones. Petitioners SFA&A and Waddell contend that USOC should not be legally empowered to silence only those uses of "Olympic" that offend USOC, without regard to trademark and constitutional considerations. The lower court's decision in this case sanctions that legally unconscionable outcome. It empowers USOC to wield the potent claim of trademark infringement without fulfilling its attendant burden of proof, and to use the weapons of civil suit and injunction in order to target and restrain those persons and associations whose uses of

"Olympic" fail to please USOC, while allowing uses of "Olympic" by those groups with whom USOC has chosen to co-exist. In permitting these results, the Court of Appeals' opinion on the merits jumps outside basic boundaries of statutory interpretation and vaults over fundamental constitutional guarantees.

It is the statutory position of petitioners SFA&A and Waddell that Congress did not intend to bestow such unbridled and dangerous powers upon USOC, by the enactment of section 380. It is petitioners' constitutional position that, if Congress did so intend, the guarantees of free expression, free association and equal protection have been violated by enactment of section 380.

The express requirement that, in suing to prevent use of "Olympic" by unconsented-to users, USOC must prove that the challenge uses "tend...to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with...[USOC] or any Olympic activity," 36 U.S. Code section 380(a)(4), was methodically crossed out of the statute by the lower courts, at each stage of this litigation from the granting of the t.r.o. to the affirmance of the summary judgment on its merits, just as surely as SFA&A's volunteers crossed "Olympic" off their paraphernalia. That excision by the lower courts cut into the plain intent of Congress to require USOC to prove trademark infringement in order to secure remedies for it, under section 380(a)(4), just as deeply and unnecessarially as the excision of "Olympic" from petitioners' materials cut into their rights of free expression and association. Likewise, the lower courts' unreasoned refusal to harmonize section 380 with trademark law, by their determination to make Lanham Act defenses including "fair use in description" inapplicable to adjudge the legality of a use of "Olympic," displaced the clear intent of Congress. While Congress gave USOC the power to bring "civil action...for the remedies provided in...the Trademark Act of 1946," 36 U.S. Code Sec. 380, the lower courts discarded that explicitly limited empowerment of USOC, and fancifully

imposed upon Congress a grandiose and constitutionally unwary intent to enable USOC to secure remedies against virtually every and any use of "Olympic," regardless of the trademark consequences, purpose, context or circumstances of the use of "Olympic."

Assuming for the sake of argument that Congress was free to bestow a trademark upon USOC as to the words "Olympic" and its derivatives, in order to enable USOC to raise funds to sponsor U.S. amateur athletic participation in the Olympic Games, the force of that trademark should be stopped short of becoming a license to censor and discriminate. Yet the Court of Appeals' open vindication of USOC's almost totally unlimited claim of power as to "Olympic" permits USOC to pick and choose, on the basis of whimsy, discriminatory intent, or subjective aesthetic reaction, among essentially all users of "Olympic," slapping injunctions and attorneys' fees awards (or not) upon whomever and whatever it pleases.

Under the interpretation of USOC's power as to "Olympic" rendered by the U.S. Court of Appeals for the Ninth Circuit in this case, USOC can enjoin an author or publisher who uses "Olympic" in the title of its publication (unless the publication is distributed free of charge); USOC can sucessfully sue the playwright, artist or athlete who proposes to create and promote a new type of "Olympics," regardless of whether the new "Olympics" has any conceivable likelihood of being mistaken for USOC's activity; USOC can secure an injunction as to the use of "Olympic" by whichever groups of people USOC decides should not have their own "Olympics," be they gay persons, police, Armenians or black schoolchildren, and regardless of whether their contests are serving charitable or expressive purposes. The havoc wreaked by the Court of Appeals' opinion, in First Amendment terms, finds no logical limit in the terms of that opinion.

The instant case demonstrates the constitutional harm in a dramatic and precise way. Purporting to be litigating against

a "willful trademark infringer," USOC has secured broad injunctive orders, and, potentially, a substantial award of attorneys' fees, in litigation against a nonprofit corporation and a volunteer, who used the generic, historic and widely adopted words, "Olympic," "Olympics" and "Olympiad" (and *not any other* trademark, service mark, trade name, symbol, emblem or insignia of USOC or IOC protected by any law) for expressive and beneficent purposes. The U.S. Olympic Committee's section 380 victory in this case, if any, should have obliged it to try the disputes of material fact presented, and should have depended upon proof of the elements of trademark infringement set forth in section 380, and upon the absence of proof of a recognized Lanham Act defense and the absence of any proved defense to that infringement. As to the statute itself, SFA&A and Waddell also contend that they cannot in any case be held to have been "*willful* trademark infringers" as to "Olympic," in that to prove "wilfullness," USOC would have to show that SFA&A acted in knowing or intentional violation of USOC's rights as to "Olympic," when the relevant boundaries upon those rights were not drawn in 1982 and are at issue in this very case.

The lower courts' readings of section 380 cannot possibly be squared with the First, Fifth and Fourteenth Amendments. That squaring of an Act of Congress with the Bill of Rights is obligatory upon the courts where, as in the instant case, a party seeks to invoke judicial power to enjoin use of politically symbolic and powerful word, as against one (or even all) users of that word.

USOC is a state actor; in performing its clearly governmental functions (36 U.S. Code sections 374 et seq.) as the manager, fund-raiser and standard-setter for U.S. participation in the Pan-American and International Olympic Games, which it was chartered by Congress to do, USOC's conduct fits within all known and familiar definitions of state action. Moreover, the process of constitutional reckoning cannot be avoided where a judicial injunction reaches the protected

communication of ideas and emotions, because the injunction itself represents governmental action, even if this Court were to hold as a matter of law that USOC is not a governmental actor despite the direct derivation of its existence and powers relevant to this dispute from an Act of Congress.

Even if petitioners' use of "Olympic" could be held as a matter of law to constitute an infringement of USOC's trademark, that infringement could and should have been remedied by the requirement of a disclaimer, as a matter of constitutional law governing commercial speech. Months before USOC sued SFA&A, SFA&A offered to place a disclaimer upon all of its uses of "Olympic," stating in exact words that SFA&A's activities including the Gay Games are "not associated with the U.S. Olympic Committee". (R.5 at Ex.C) In light of that fact, and the case law emphasizing the necessity of avoiding enjoining protected speech in trade cases, the injunction issued below was an excessive remedy, even assuming *arguendo* that SFA&A's use of "Olympic" properly could be characterized as commercial speech that would infringe the mark, absent the disclaimer. The injunctions issued and upheld below would have overstepped ordinary trademark law bounds, in a standard trademark infringement action; surely here, in this non-standard case, a disclaimer was exactly the most extensive remedy that the statute and the Constitution should have been carefully read to require.

ARGUMENT

I. SECTION 380 OF THE AMATEUR SPORTS ACT REQUIRES A SHOWING OF TENDENCY TO CAUSE CONFUSION, MISTAKE, DECEPTION OR FALSE SUGGESTION OF AN ASSOCIATION WITH USOC IN CONJUNCTION WITH AN ACTION AS TO UNCONSENTED-TO USE OF "OLYMPIC"; USOC SHOULD HAVE BEEN OBLIGED TO MAKE THAT SHOWING AT BAR.

In relevant part, section 380 gives USOC a right of action as to unconsented-to commercial or promotional[1] uses of "the words 'Olympic,' 'Olympiad,' 'Citius Altius Fortius,' *or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with ___ [USOC] or any Olympic activity.*" (emphasis added) This language, as well as other language in section 380 and the legislative history of the section, strongly evinces an intent on Congress' part to require USOC to prove trademark infringement as to any use of "Olympic" as to which it brings "a civil action...for the remedies...[in] the Trademark Act of 1946." The purpose of section 380 was identified in Congress to have been to enable USOC "...to protect certain symbols, emblems, trademarks, tradenames and words by civil action pursuant to the Trademark Act of 1946." House Rep't. No. 95-1627, in U.S.Code Cong. & Admin. News pp. 7483, 7488 (1978)

The particular and specific purpose of enactment of section 380, as to the word "Olympic," was to clarify that USOC had a right to bring a civil action against trademark

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[1] The types of uses of "Olympic" reached by section 380(a) include "uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition...". By the express reasoning of the opinion of the Court of Appeals, any "advertising" containing the word "Olympic," any "selling of products with the word 'Olympic' on them," and any "promotion... of games" constitute prohibited uses under section 380. (PCert., App.1, p.4)

infringers as to that word; this right was created by section 380, because the criminal penalties as to use of "Olympic" had proved to be unworkable due to the apparently insuperable burden of proving criminal intent. *Id.* at 7488, 7496. It would be difficult to believe, much less to reason from the language and legislative history of section 380, that Congress meant to move so drastically, from requiring that a criminal intent with regard to unauthorized use of "Olympic" be proved to requiring that USOC prove nothing whatsoever as to the user's intent.

Yet it is this leap to an unlikely statutory construction, which affords USOC a right to prohibit all uses of "Olympic" by an unconsented-to user except those lacking a commercial element howsoever subsidiary *and* not engaged in promotion of any competition, that the lower courts made throughout this litigation. From the determination of the District Court that it could find the standards for preliminary injunctive relief met because it "may presume that defendants' actions tend to cause confusion and mistake and tend to suggest falsely a connection . . .[with USOC]" (P.Cert., App.8, pp.114-115) to the affirmance of that preliminary injunction by the Court of Appeals, as well as in the grant of summary judgment and the opinion affirming that judgment, at each crucial stage the lower courts removed the statutory hurdle to USOC's wholesale prohibition of almost all uses of "Olympic," by excising the plain requirement of proving tendency to confuse from the Act (P.Cert., App.7, p.87 ("we do not mean to imply that it is necessary in this case to prove a tendency to confuse"); P.Cert., App.4, p.63 (promotion of an athletic competition *per se* is "sufficient violation to impose liability"); P.Cert., App.1, pp.4-7 ("we conclude that [proof of] confusion is unnecessary")). The requirement that USOC prove tendency to confuse or the like as to the use of "Olympic" it challenged should not have been cast aside by the lower courts; their disregard of this facial requisite of a section 380 violation as to "Olympic" removes the conceptual border of "trademark infringement" from USOC's claim, in

this and every future case of unconsented-to use, resulting in unprecedented power on the part of USOC to use civil process to prohibit non-infringing and non-damaging uses of the word "Olympic."

The "language employed by Congress" as to the word "Olympic" in section 380, and the "ordinary meaning of that language" as developed in the Trademark Act, to which section 380 expressly refers in giving USOC the right to sue in certain situations, require this Court to interpret Congress' intent as one bestowing nothing more than a trademark upon USOC. *Park 'n' Fly* v. *Dollar Park 'n' Fly*, ___U.S.___, 105 S.Ct. 658, 662 (1985). USOC's attempt in this litigation to establish that it has greater rights in "Olympic" than a holder of an incontestable trademark (Opp.P.Cert. pp.4-5), and to persuade this Court that those greater-than-trademark rights should be upheld regardless of the tendency of others' uses of "Olympic" to cause confusion or, not of the like, should fail as a statutory matter.

USOC apparently asserts that it has more than a trademark on "Olympic" and should be free to prohibit whatever uses of "Olympic" displease it, even where the uses are not definably commercial, and even where there is no proof that they have any tendency to cause confusion as to the origin of products or services or as to a relationship of the user with USOC. (Opp.P.Cert. pp.4-9) USOC has argued in this litigation that "any unauthorized use of 'Olympic' would be unlawful [under section 380]" (J.A.I-21) and that any promotion of an athletic competition as "Olympic," regardless of the presence or absence of any commercial element, constitutes a violation of section 380.[2] (J.A.I-117)

The position of USOC, that it may freely go about using the institution of the law to prohibit and gain remedies for

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[2]USOC has not even unambiguously admitted in this case that newspaper reporting is free of section 380 constraints, stating only that one exception to section 380 "*may be*" accurate news reporting of "the Olympic Games." (J.A.II-189) (emphasis added)

any uses of "Olympic," whether or not these have any tendency to cause confusion, mistake, deception, or false suggestion of a relationship with the USOC and/or the Olympic Games, frontally disregards the terms and purpose of section 380. In accepting that position of USOC as to its possession of a trademark-plus as to "Olympic," the lower courts in this case have yielded an interpretation of section 380 that cannot be upheld upon the terms, history or purpose of the statute.

II. PETITIONERS CLAIM THAT THEIR USE OF "OLYMPIC" TO DESCRIBE AND IDENTIFY THE GAY GAMES CONSTITUTED A "FAIR USE IN DESCRIPTION"; THIS LANHAM ACT DEFENSE TO USOC'S CLAIM OF TRADEMARK INFRINGEMENT SHOULD BE AVAILABLE UNDER SECTION 380 AND IT SHOULD HAVE BEEN TRIED BELOW.

From the beginning of this litigation, the promoters of the Gay Games claimed that their use of "Olympic" was defensible as a "fair use in description" as against USOC's charge of "trademark infringement," in that SFA&A and its participants used and sought to use "Olympic" "in good faith only to describe to users the goods or services" consisting of the Gay Olympic Games (J.A.I-84-85). This defense is permitted even as against an incontestable trademark, 15 U.S. Code section 1115(b)(4).

The essence of this defense by SFA&A is that its use of "Olympic" was not a trademark use, 15 U.S. Code section 1115(b)(4); see also, *Abercrombie & Fitch Co.* v. *Hunting World Inc.*, 537 F.2d 4 (2nd Cir. 1976); *Soweco Inc.* v. *Shell Oil Co.*, 617 F.2d 1178 (5th Cir. 1980) (good faith dissemination of trademarked word(s) in description of goods or services or in description of geographic origin defends against claim of trademark infringement). This defense was not tried below because the District Court in granting summary judgment to USOC held that the defenses to claims of trademark infringement developed under the Lanham Act do

not apply in section 380 litigation. (P.Cert., App.4, p.64) The Court of Appeals specifically affirmed the District Court on that point. (P.Cert., App.1, p.7)

The reasoning of the Court of Appeals as to the inapplicability of Lanham Act defenses under section 380 appears to be a bootstrap. The Court of Appeals reasoned in pertinent part that "[i]n light of the purpose of the Act, which gives the USOC more power than any ordinary trademark holder by allowing it to prohibit non-confusing uses," Lanham Act defenses were "irrelevant." (P.Cert., App.1, p.7-8) If this Court determines, as SFA&A argued above, that Congress did not empower USOC to prohibit uses of "Olympic" that are not proved to have a tendency to confuse or the like, then, logically, the Court of Appeals' primary reason for reading Lanham Act defenses out of section 380 falls.

Moreover, the preclusion of the "fair use in description" defense in section 380 litigation places unconsented-to users of "Olympic" in a worse legal position than commercial users of other terms fairly to describe the nature or origin of their goods or services are under the Lanham Act, for no logical reason. While the commercial user of "gracious ladies," "safari," or "I love you" is free to defend its use of the trademarked term by proof of fair use in description, the non-commerical user of "Olympic" is not. See, e.g., *Abercrombie & Fitch Co.* v. *Hunting World Inc.*, *supra,* 537 F.2d 4 (2nd Cir. 1976)(where the term "safari" is not used as a trademark, but for description, there is no infringement even of otherwise incontestable mark); *Gracious Lady Service Inc.* v. *Welcome Wagon International Inc.*, 295 F.Supp. 1373 (D.Pa. 1969); cf. *MBH Enterprises Inc.* v. *WOKY Inc.*, 633 F.2d 50, 53-55 (7th Cir. 1980) (court refused to enforce registered service mark on "I love you," stating in relevant part that "[t]here is a limit to the ability to appropriate the language for exclusive commercial use").

At no point in this litigation has USOC offered a convincing reason to support this inequitable and disharmonious consequence, in trademark law terms, that results directly

from USOC's position that the "fair use in description" defense should not apply to protect non-trademark descriptive uses of "Olympic," such as that which SFA&A avers it was engaged in at bar.

In their opposition to the petition for certiorari, USOC and IOC have argued to this Court that the real nature of section 380 is an anti-dilution protection as to "Olympic." (Opp.P.Cert. pp.6-9) SFA&A respectfully submits that USOC's anti-dilution arguments at this stage represent a severe shifting of ground in this litigation; USOC did not litigate its anti-dilution theory, nor offer any factual evidence at any stage to support its application to SFA&A's use of "Olympic" at bar, until this case came to this Court. Indeed, after pleading a cause of action for dilution under California law (J.A.1-14), USOC submitted no evidence nor any argument on that claim. The dilution claim, along with all claims, other than the section 380 claim for infringement of USOC's trademark on "Olympic," was "not subsequently pressed, and [is] no longer in the case." (P.Cert., App.1, p.2) USOC concedes in this Court that the "summary judgment was based solely on section 380." (Opp.P.Cert. 6 at n.5) In these circumstances, petitioners SFA&A and Waddell respectfully suggest that USOC's departure from the "trademark infringement" approach in favor of the "anti-dilution" theory, in opposition to the petition for certiorari, represents a reaction to the potential subsidence of the ground upon which the judgment below was granted and affirmed.

Even so, USOC's argument that section 380 is chiefly intended to provide it with anti-dilution remedies for the proliferation of "Olympic" products and services at first blush might appear to provide a reason for effacing Lanham Act defenses from section 380 litigation, as the courts have done in the instant case. After all, if as USOC contends, Congress' real purpose in enacting section 380 was to provide a "new cause of action [for] protection for Olympic-related designations apart from the protection provided by the

Federal Trademark Act (footnote omitted)," trademark infringement defenses then logically would not apply under section 380.

However, careful consideration of the "anti-dilution" interpretation of section 380 that USOC now urges upon this Court shows its considerable weaknesses. There is no mention of the purpose of giving USOC rights or remedies to prevent dilution in the language or legislative history of section 380. The section instead is phrased in terms of trademark infringement concepts, and refers, in the part bestowing a right to sue on USOC, expressly to the Trademark Act of 1946.

In interpreting section 380, at least one federal court has observed in pertinent part that:

> Notwithstanding the broad wording of subsection (c) it cannot be interpreted to mean that only the defendant (USOC) and its licensees may use the word "olympic" and the enumerated symbols for any purpose whatsoever... it appears that Congress' objective has been to prevent the deceptive or confusing use of these corporations' mottoes, emblems and the like by unauthorized persons... [S]ubsection (c) appears to have been designed to prevent all persons other than the U.S.O.C. from registering the Olympic words and symbols as trademarks or service marks in connection with any types of goods or services whatsoever, rather than as a blanket prohibition of all uses whether commercial or not. What little legislative history there is about this subsection supports this conclusion. *Stop The Olympic Prison* v. *USOC*, 489 F.Supp. 1112, 1119-1120 (S.D.N.Y. 1980).

Furthermore, if one considers the plight of the incontestable trademark holder in general, that holder is in no different position than USOC relative to the risk of dilution arising from the "fair use in description" by others of its trademarked terms. Thus, to hold that USOC can prohibit and secure remedies for uses of "Olympic" fairly to describe

others' goods and services, while requiring all other trademark holders to suffer whatever dilution stems from others' non-trademark uses (that is, good faith uses fairly to describe) of trademarked words, bestows an unjustified advantage upon USOC vis à vis other trademark holders. That advantage is not warranted by the language of section 380, not supported by its legislative history, and not justified by the apparent purpose of section 380, enabling USOC to sue for "the remedies provided... in the Trademark Act of 1946" where unconsented-to users use "Olympic" in misleading and confusing way, in commerce. Nor does USOC's "anti-dilution" rationale for section 380 respond to constitutional considerations, even if there were sufficient support in the history and language of the statute to find it convincing. See R. Shaughnessy, "Trademark Parody: A Fair Use and First Amendment Analysis," 72 Virg.L.Rev. 1079, 1116 and n.193 thereof (Sept. 1986).

There is an additional reason to reject USOC's belated effort to fit section 380 into an "anti-dilution" mold, in order to save the statute from harmonization with the rights of users of "Olympic" outside distinct trademark circles. That reason is simply that when Congress passed section 380, it did not speak a word, in the statute or about it, about intending to prevent all popular contests calling themselves "Olympics" from doing so, even if they were not in any way likely to be confused with USOC or mistaken for the Olympic Games. If this Court were to accept USOC's "anti-dilution" model of the meaning of section 380, in spite of the absence of support for that model in the language, history and declared purposes of that enactment, this Court would be determining in place of Congress that USOC should be entitled to ban all uses of "Olympic" to identify contests, even where such uses do not infringe upon USOC's trademarks in any way. The process of legislative interpretation, which rests ultimately upon a sincere judicial effort to glean Congress' true intent from its words and actions (and occasionally from its silence), would be thoroughly chaotic if this Court were to

adopt USOC's expedient approach to statutory interpretation.

III. IF USOC IS NOT A STATE ACTOR AS A MATTER OF LAW, AT LEAST THE QUESTION OF STATE ACTION CONSTITUTED A TRIABLE DISPUTE OF MATERIAL FACT FOR THE DISTRICT COURT TO DECIDE.

USOC derives its existence from a federal charter; moreover, it derives its claimed power to control use of "Olympic" from a federal statute. 36 U.S.Code section 371 et seq.; *Michels* v. *USOC*, 741 F.2d 155, 157 (7th Cir. 1984) ("The USOC was chartered by Congress in 1950. The Amateur Sports Act of 1978 substantially revised that charter.") The 1978 Act "was enacted in response to years of rivalry, warfare, and confusion among amateur athletic organizations... The Act attacked the problem through structural revision: it created a hierarchical system headed by the USOC, in which the power is vested 'to act as the coordinating body for amateur athletic activity.'" (citation omitted) *Oldfield* v. *Athletic Congress*, 779 F.2d 505 (9th Cir. 1985). There can be no real dispute that the governmental functions of regulating, controlling, sponsoring and raising funds for U.S. amateur athletic activities, including participation of the U.S. in the Olympics, are placed on USOC's shoulders by this scheme of federal law.

Part of USOC's federally created regulatory authority as to amateur athletic opportunities has been exercised by USOC in the determination of what organizations are permitted to hold their own "Olympics." USOC claims in this record that it has exercised this governmentally bestowed power in favor of "Olympics" for disabled persons, in the "Special Olympics," and for youth in the "Junior Olympics" and the "Explorere Olympics." (J.A.I.-33, J32-133) The record also establishes that numerous "Olympics," including an annual international athletic contest called the "Police Olympics," have taken place with the apparent consent of,

and at least without litigative and injunctive intervention by, USOC. (J.A.I-100, 143-144; J.A.II-250-252, 310-311; R.17 at Ex.s' F, Z; R.106 at Ex.B)

USOC's wielding of a power to authorize or veto amateur athletic contests as "Olympics," which power purportedly was bestowed by a federal statute pursuant to a federal charter enabling USOC to perform the unambiguously public function of governing and funding U.S. amateur athletic participation with emphasis upon U.S. participation in the Olympics, raises at least a factual question as to whether USOC was engaged in state action in its conduct in the instant case. Yet the lower courts denied trial upon this issue. (P.Cert., App.1, pp.9-10; App.2, p.25; App.4, pp.64-65)

The facts adduced, showing that USOC's conduct in enfranchising some "Olympics," in permitting others by inaction to prevent them, and in acting to stop the "Gay Olympic Games" from proceeding by that name, establish disciminatory and censorious state action, just as clearly as the Eagle Cafe's racial discrimination under the roof of government constituted state action in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961). Here, as in *Burton*, USOC is invoking powers bestowed upon it by government to enable it to perform public functions and USOC is using public property (that is, a word bestowed upon it by Congress as well as its resources drawn from public as well as private sources)(J.A.II-190, 206) to enforce discrimination and, even beyond the wrong in *Burton*, to restrain free expression and to chill expressive association among a group of persons concerned about gay/lesbian rights, of whose "Gay Olympic Games" USOC disapproves. (J.A.I-54-55, 178 para.7; J.A.II-249-251); see also, *Evans* v. *Newton*, 382 U.S. 296 (1966); *Marsh* v. *Alabama*, 326 U.S. 501 (1946).

The fact that discrimination and suppression of First Amendment rights are the wrongs claimed at bar ought to distinguish the case altogether from *DeFranz* v. *USOC*, 492 F.Supp. 1181 (D.D.C. 1980), a case repeatedly miscited by USOC below for the proposition that USOC is not engaged

in state action in this case. In *DeFrantz*, the District Court specifically distinguished *Burton* because it involved state-empowered invidious discrimination. *Id.* 492 F.Supp. at 1193.

If, as USOC claims in this litigation, Congress empowered it to regulate amateur athletics *inter alia* by consenting to some popular, amateur "Olympics" while vetoing others, that particular empowerment, when used to discriminate and suppress free expression and association, constitutes state action under *Burton*, and neither *DeFrantz* nor any decision of this Court as to state action stands to the contrary. Even assuming *arguendo* that this Court cannot determine that USOC is a state actor on this record, as a matter of law, the question must be remanded for trial.

> Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance.
>
> *Burton* v. *Wilmington Parking Authority*, *supra*, 365 U.S. 715, 722.

The failure of the lower courts in this case to permit a trial on the issue of USOC's state action, in light of the clear precedents of this Court requiring it in cases such as the one at bar, represents a serious departure from those precedents.

The Court of Appeals' attempt to distinguish its determination that there was state action in USOC's denial of certain racing events to women at the 1984 Olympics, in *Martin* v. *International Olympic Committee*, 740 F.2d 670, 677 (9th Cir. 1984), based upon the proposition that "[t]he determination whether state action exists is entirely dependent on the unique facts of each case," citing *Burton*, *supra* (P.Cert., App.2, p.26) denies true respect for this Court's decisions requiring factual determination of the state action issue. In the case at bar, where that very process of proving the "unique facts" to determine the presence or absence of state action was bypassed at both the trial and appellate levels below, the state action precedents of this Court obviously require remand on this issue, at minimum.

IV. THIS COURT NEED NOT REACH THE QUESTION OF STATE ACTION BY USOC IN ORDER TO ADDRESS THE CONSTITUTIONAL IMPLICATIONS OF THE INJUNCTION AT BAR, IN THAT ENFORCEMENT OF USOC'S WILL AS TO "OLYMPIC" BY THAT INJUNCTION ITSELF CONSTITUTES STATE ACTION.

In *Shelley* v. *Kraemer*, 334 U.S.1 (1948), this Court held that judicial enforcement by state courts of racially restrictive covenants violated the Fourteenth Amendment's guarantee of equal protection. Even the District Court judge who granted the preliminary injunction at bar recognized the apparent application of *Shelley* v. *Kraemer* to this case. (P.Cert., App.8, p.121). Moreover, the imposition of an injunction against particular speech surely constitutes state action, for constitutional purposes. *New York Times* v. *United States*, 403 U.S. 713, 714 (1971); *Organziation for A Better Austin* v. *O'Keefe*, 402 U.S. 415, 419 (1971); *Near* v. *Minnesota*, 283 U.S. 697 (1931).

Assuming *arguendo* that the question of USOC's state action is not resolvable on this record as a matter of law against USOC, the imposition of an injunction against the "Gay Olympic Games," by that name, constituted state action, obligating the lower courts to pay heed to the counterclaims of SFA&A and Waddell that USOC was acting to discriminate and to censor in suing them for use of "Olympic." (J.A.I-172-176) The short shrift given below to these constitutional counterclaims cannot be reconciled with the fact that state action was thoroughly present at bar, as soon as the District Court lent its powerful imprimatur to USOC's alleged discrimination and censorship, by an injunction that enabled USOC to discriminate against and silence the lawful speech of a persecuted minority, on pain of contempt if the enjoined persons resisted. (J.A.I-88-115)

V. THE DOCTRINE THAT GENERIC WORDS CANNOT BE TRADEMARKS IS ROOTED IN PART IN FIRST AMENDMENT CONSIDERATIONS OF PRESERVING FREEDOM OF SPEECH.

In a trademark dispute as to the use of the word "Monopoly" in conjunction with the word "Anti-" to name a game that rivaled "Monopoly" both commercially and ideologically, the U.S. Court of Appeals upheld the "Anti-Monopoly" creator's position, observing in pertinent part:

> "[t]he purpose of the doctrine that generic terms cannot be made trademarks is to prevent the appropriation of a term that is already in wide use among those who are potential purchasers of the thing that the term describes..."
>
> *Anti-Monopoly Inc.* v. *General Mills Fun Group Inc.*, 684 F.2d 316 (9th Cir. 1982), cert. denied., 459 U.S. 1227 (1983).

In this regard, this Court itself recently had occasion to observe that the doctrine of non-trademarkability of generic words serves as a protection against the taking of words from the "public domain," thus preserving the Lanham Act itself against challenge on that point. *Park 'N Fly* v. *Dollar Park 'N Fly*, cited *supra*, __U.S.__, 105 S.Ct.658, 665.

In 1978, Congress took the word "Olympic" from the "public domain" and encapsulated it in a statutory bestowal of a right on the part of USOC to prevent trademark infringement as to it. Congress' purpose in doing this was sufficiently plain; USOC needed a means to raise funds to perform the function of supporting U.S. participation in amateur athletics up to and including the Olympic Games, in which U.S. athletes participate quadrennially, at an international level. Congress' encapsulation of "Olympic" in a trademark, despite its generic-ness and despite its wide use, can be authorized by law only to the extent that the statute also places limits upon USOC's right to claim infringement, consisting in cases such as that at bar of requiring USOC to prove tendency to confuse as to "Olympic," and of enabling

Lanham Act defenses to USOC's infringement claims.

If those statutory contentions are rejected, the creation of this "trademark" by Congress in USOC itself must be scrutinized constitutionally, because such an unlimited power in USOC to control noncommercial along with commerical uses, and to suppress those uses of which it disapproves, generates severe First Amendment problems, as the dissenters from the denial of *en banc* review have set forth. (P.Cert., App.3, pp.28-59) As the dissenters below stated:

> By word Olympic has a meaning unique within our language. It connotes open and intense competition among non-professional athletes, usually involving the best and most accomplished contestants. Thus, we have Special Olympics, Junior Olympics, Police Olympics, even Canine Olympics, normally involving competition among the best and finest within the denoted category. I have great difficulty with the idea that Congress can deny all of us that word, and the ideas it embodies, in connection with all public endeavors... The ideas embodied in the word Olympic can, of course, be expressed by other means, but only in a much clumsier fashion, without the same nuance of meaning.
> (P.Cert., App.3, pp.31-33)

If section 380 is read to mean that Congress intended to empower USOC to be the arbiter of all uses of "Olympic," even among nonprofit groups engaged in essentially noncommercial activity were the sale of items with "Olympic" is a subsidiary financial activity relative to the group's primary exercises of free expression and association, see *New York Times* v. *Sullivan*, 376 U.S. 255, 265-266 (1964) and *Murdock* v. *Pennsylvania*, 319 U.S. 105, 112 (1943), then section 380 is unconstitutional as applied to the use of 'Olympic' by SFA&A and Waddell and those associated with them in the promotion of the Gay Olympic Games. The reasoning of the dissenters from *en banc* review below, as to why section 380 would thus be unconstitutional as applied, is comprehensive, and petitioners respectfully defer to that

reasoning in this Brief.

On the matter of the unconstitutionality of section 380 if read as the majority below did, to enable USOC to prohibit virtually every use of "Olympic" other than uses that have no financial element (which would be increasingly difficult to conjure in a world where communication is almost never free from economic costs and consequences), petitioners wish to add one note of emphasis to the reasoning of the dissenters from *en banc* review. In denying use of "Olympic" to SFA&A and Waddell, and in going to court and enjoining that use, USOC acted to discriminate against a group whose rights of free speech and association have proved to be particularly vital to that group's education of and communication with others. R. Rivera, *"Our Straight-Laced Judges: The Legal Position of Homosexual Persons in The United States,"* 30 Hast.L.J. 799, 934 (March 1979) "[n]owhere [other than in First Amendment cases concerning freedoms of speech and association] is there such a consistent respect for the constitutional rights of the homosexual individual"; R. Achtenberg, ed., *Sexual Orientation and the Law*, sec. 9.01 p. 9-2 (New York 1985) ("Freedoms of speech, press, religion, association, assembly and petition have crucial importance in the growth and protection of the legal rights of lesbians and gay males"); J. Gomez, *"The Public Expression of Lesbian/Gay Personhood as Protected Speech,"* 1 Law & Inequality: Jour. Theory & Practice 121, 132 (1983); see, e.g., *Toward a Gayer Bicentennial Committee* v. *Rhode Island Bicentennial Foundation*, 417 F.Supp. 632 (D.R.I. 1976); *Alaska Gay Coalition* v. *Sullivan*, 578 P.2d 951 (1978); *Gay Law Students of Hastings College* v. *Pacific Telephone & Telegraph Co.*, 24 C.3d 458 [156 Cal.Rptr. 14](Cal.Sup.Ct. 1979).

The vitality of those precious constitutional rights depends upon consistent and civilized judicial interpretation of the First and Fourteenth Amendments in application to cases concerning gay/lesbian speech and association. These amendments should mightily guarantee nondiscrimination

by government against the protected expression and association of unpopular groups, such as gay and lesbian persons in the U.S. today. By the guidance of decisions such as *Police Department of Chicago* v. *Mosley*, 408 U.S.92, 98-99 (1972) ("justifications for selective exclusions from a public forum must be carefully scrutinized... discriminations among [speakers] must be tailored to serve a substantial governmental interest"), the right of SFA&A to have a "Gay Olympic Games," absent a showing of real harm and real injury to the governmental interests served by USOC's control of "Olympics" generally, should be located firmly at the center of constitutional protection. See also, *City of Los Angeles* v. *Preferred Communications*, ___U.S.___, 106 S.Ct. 2034, 2035-2037 (1986); *City of Madison* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976).

It is noted in this regard that USOC never proved any injury to it by SFA&A's holding of a "Gay Olympic Games," much less any jeopardy to the governmental interests that USOC has been empowered by Congress to serve. In curbing protected speech and association, the party seeking the curb is supposed to prove that the curb serves a compelling governmental interest and that no alternative that does not so affect speech or association is available. *Police Department of Chicago* v. *Mosley* and *City of Madison* v. *Wisconsin Employment Relations Department*, *supra*; *Southeastern Promotions Ltd.* v. *Conrad*, 420 U.S. 546, 553 (1975). Not only did USOC make no such showing of a compelling governmental interest and absence of non-burdening alternatives below; USOC never proved that it was in any way harmed by the promotion of a "Gay Olympics" by that name.

The possibility of a "Gay Olympics" peaceably and productively co-existing with the Special, Junior and Explorer Olympics that USOC openly approves, and with Olympics by Police and others that USOC tacitly condones, cannot be presumed to harm USOC, as the courts below seemed willing to do. If there is harm to the interests that

USOC is supposed to serve, by this proposed co-existence, certainly the guarantees of free speech, free association and equal protection require that that harm be *proved*, and that ways of preventing that harm that do not burden constitutional freedoms be *considered* before a ban on speech is imposed.

VI. THE INJUNCTION PROHIBITING SPEECH AND CHILLING EXPRESSIVE ASSOCIATION THAT THE LOWER COURTS UPHELD DOES UNNECESSARY CONSTITUTIONAL INJURY, AND A DISCLAIMER WOULD AND SHOULD HAVE AVOIDED THIS INJURY.

In upholding the blanket prohibitory interpretation of section 380 urged upon it by USOC, the Court of Appeals did not engage in the required regimen of rigorous and careful constitutional decision-making where free speech interests are at stake. See cases cited in part V., *supra*; see also, *Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 499 (1984). The Court of Appeals settled instead for an unacceptably casual ratification of the constitutional damage inflicted by the injunction below. That the injunction below fails even to satisfy the requisites of a proper injunction in a commercial speech case is obvious, under a brief reading of trademark and other commercial precedents that establish the impropriety of injunctions where disclaimers will suffice. See, e.g., *Better Business Bureau* v. *Medical Directors Inc.*, 681 F.2d 397, 405 (5th Cir. 1982), citing *In the Matter of R.M.J.*, 455 U.S. 191 (1982) ("although the states may regulate commercial speech, the First and Fourth Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further substantial interests... [t]he absolute prohibition on appellant's speech, in the absence of a finding that his speech was misleading, does not meet these requirements"); *Virginia State Board of Pharmacy* v. *Virginia Consumer Council*, 425 U.S. 748 (1976).

Even assuming contrary to the record facts below that

SFA&A could be correctly characterized as engaged in trademark use of "Olympic" in a commercial enterprise, the impropriety of an injunction where no tendency to confuse has been proved and where there is an informational element to the speech being enjoined is well-established in commercial speech precedents. See cases cited *supra*; also, *Consumers Union* v. *General Signal Corp*, 724 F.2d 1044, 1053-1055 (2nd Cir. 1984), cert. denied, __U.S.__, 105 S.Ct. 100 (1984). In *Consumers Union* v. *General Signal Corp.*, holding that the District Court erred in enjoining the commercial company from making any reference to Consumer Report's favorable rating, the Court of Appeals observed in pertinent part: "Disclaimers are a favored way of alleviating consumer confusion as to source or sponsorship... [a]bsolute prohibitions of speech as provided for in the instant preliminary injunction are improper where there is any possibility that an explanation or disclaimer will suffice." *Id.* at 1053. See also, *Champion Spark Plug Co.* v. *Sanders*, 331 U.S. 125, 130 (1947). *Allen* v. *National Video Inc.*, 610 F.Supp. 612, 630-631 (S.D.N.Y. 1985) (injunction against any appearance of Woody Allen look-alike held overbroad, even where prior disclaimer was found ineffective). The injunction here fails to pass constitutional muster, even under the *commercial* speech precedents of the federal courts.

CONCLUSION

The instant case presents an opportunity for this Court to render a clear, simple interpretation of section 380 of the Amateur Sports Act, enabling USOC to continue to enforce its mark as to "Olympic" against real trademark infringers, while requiring it to prove tendency to confuse and to learn to live with those whose uses are defensible under the Lanham Act, as other trademark holders do. Pursuant to such interpretation, USOC's cause of action under section 380 should be remanded for trial.

Whether or not this Court accepts the above-recited view

of section 380, the presence of significant constitutional questions must guide it in interpretation of section 380. Any interpretation of that statute that yields a speech-prohibiting and association-chilling result must be reconciled with the First and Fourteenth Amendments. This is particularly necessary where it is obvious that a variety of groups use the word "Olympic" publicly, symbolically and politically, to fulfill an array of associative and communicative purposes, presumably enriching of the culture, that courts are not normally supposed to use their injunctive powers to select among or prevent. The issues of discriminatory intent, state action by USOC and other factual questions raised by SFA&A's and Waddell's counterclaims should have been tried below.

Regardless of the constitutional shape of section 380 itself, the impropriety of injunctive relief that restrains free expression, where a disclaimer was offered that would have sufficed to avoid that restraint while preventing harm to the interests of the commercial owner, is plain. Accordingly, this Court should order the permanent injunction dissolved in this case, whatever its views as to the statutory and constitutional issues presented as to the meaning of section 380.

Dated: December 4, 1986

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In The Supreme Court of the United States

OCTOBER TERM, 1986

SAN FRANCISCO ARTS & ATHLETICS, INC. and THOMAS F. WADDELL, M.D.,
Petitioners,

v.

UNITED STATES OLYMPIC COMMITTEE and INTERNATIONAL OLYMPIC COMMITTEE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Did Congress violate the Constitution when it authorized the United States Olympic Committee to sue to enjoin one who uses the designation "Olympic" to label and promote a new international athletic competition, and to market associated retail goods?

2. Should the provisions of the Amateur Sports Act of 1978 that protect against unauthorized use of the label "Olympic" for sales or for athletic contests be held to provide no more than ordinary trademark protection?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-270

SAN FRANCISCO ARTS & ATHLETICS, INC.
and THOMAS F. WADDELL, M.D.,
Petitioners,

v.

UNITED STATES OLYMPIC COMMITTEE and
INTERNATIONAL OLYMPIC COMMITTEE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

STATEMENT

Respondent United States Olympic Committee (USOC), which through its predecessors dates back to 1896 and was federally chartered in 1950, is a private group that oversees participation by U.S. amateur athletes in the quadrennial international Olympic Games and the Pan American Games, and also coordinates the Olympic Games when they are held in the United States. J.A. 9-10, 32.[1] Respondent International Olympic Committee (IOC) is an international association which recognizes "National Olympic Committees" in more than 150 countries and

[1] Citations to "J.A." are to the joint appendix filed herein, which is bound in three volumes, to "P. Br." to the Brief for Petitioners, and to "P.C.A." to the opinions in the appendices to the Petition for certiorari. Petitioners' *amici* have filed two additional briefs with 117 pages of detailed argument on legal points barely touched on in petitioners' brief; respondents have attempted also to address those insofar as seemed necessary and space permitted. The brief of Mexican American Legal Defense Fund, *et al.*, is cited as "A. Br. I" and of the Amateur Athletic Union, *et al.*, as "A. Br. II."

which has conducted the modern Olympic Games every four years (except during the two World Wars) since 1896. J.A. 7.[2]

USOC and IOC brought this action in 1982 in the United States District Court for the Northern District of California under § 110 of the Amateur Sports Act of 1978, 92 Stat. 3045, 3048, 36 U.S.C. § 380, to enjoin petitioners, a California corporation and its president, J.A. 92, from using the designation "Olympic" to promote a nine-day international athletic competition in San Francisco with thousands of participants from 20 or more countries, and on merchandise petitioners were selling to raise money. Petitioners wanted to advertise and promote their international athletic games as the "Gay Olympic Games," which they announced would be "similar to the traditional Olympic Games." J.A. 406.

Calling themselves the "Olympic Committee," J.A. 353, 361, they explained that their planned first international "Gay Olympic Games" would be held in San Francisco in 1982. J.A. 402-03. The "Gay Olympic Games" were to begin with the arrival of a lighted torch carried by relays of 2000 runners across the continent from New York, J.A. 98, 432; 355, 357, with a ceremonial "Olympic" flame-lighting in 60,000-seat Kezar Stadium in San Francisco. J.A. 402, 419. This would be followed by a specially written anthem, J.A. 355, 357, and a parade with banners and uniformed groups of thousands of athletes, marching

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[2] The International Olympic Committee was formed in 1894, J.A. 6, by private citizens from nine countries who were supporters of amateur sports, called together by Baron Pierre de Coubertin. In 1896 the IOC held the first modern Olympic Games. The IOC, a Swiss corporation, selects its own members. See INTERNATIONAL OLYMPIC COMMITTEE, OLYMPIC CHARTER 1985, Rules 11, 12 (1985), p. 20a, *infra*. Rule 12 of the Rules of the IOC provides in part: "Members of the IOC are representatives of the IOC in their countries and not their delegates to the IOC. They may not accept from governments or from any organizations or individuals instructions which shall in any way bind them or interfere with the independence of their vote."

arranged by city, J.A. 357, 414, from more than 20 different countries, J.A. 354, 400, 402. Eighteen different categories of sports contests would be held, eleven of which are traditional contests of the modern Olympic Games. J.A. 354, 359, 407, 427; P.C.A. 109-10. Closing ceremonies and presentation of gold, silver and bronze medals, J.A. 355, 410, were, according to petitioner Waddell, also to be "similar to the traditional Olympic Games" and "designed to attract competitors from around the world." J.A. 406, 425. Petitioners advertised with a logo of three overlapping circles, instead of respondents' five interlocking rings. *E.g.*, J.A. 349, 357. Petitioners stressed that the "Gay Olympic Games" were open to all athletes without regard to sexual orientation, J.A. 93-94, 99, 352, 421-22, 460, P.C.A. 110 (as are the Olympic Games, J.A. 34, 186), and were intended to be "not so much a 'Gay' olympics as they were a 'People's' olympics." J.A. 222. They were designed to foster amateur athletic competition among people throughout the world, and also to improve the public perception of homosexuals. J.A. 98, 355. Petitioners stated that their Games were intended to be "within the format of Olympic style competition," J.A. 406, 352, and to "rival the traditional Olympic Games." J.A. 402.

In advertising and promoting the "Gay Olympic Games," petitioners solicited contributions and sold goods that included an "official Olympic T-shirt," buttons, bumper stickers, and other merchandise carrying the legend "Gay Olympic Games." J.A. 94, 107, 113-14, 167, 360, 362, 427. They also charged admission, J.A. 426, 428, and registration fees, J.A. 353, 408. They referred to their office as "Olympic Headquarters." J.A. 361. They engaged in local and national fundraising" J.A. 361, 400, 402, 404, and succeeded in obtaining hundreds of business and corporate contributions, J.A. 109, 113, 399, 428, including support from such companies as the Marriott Corporation, J.A. 114. They held fundraising benefits. J.A. 109, 417, 427. The planned "Gay Olympic Games" sought, J.A. 418, 425, 432, and received wide publicity in the press, locally, nationally, and

internationally, J.A. 107, 409, 413, 418, 421, 459, while for themselves "retain[ing] all visual and sound rights." J.A. 413.[3]

The executive director of USOC, on learning of petitioners' activity, did not object to petitioners' promoting a new international athletic competition consciously modeled on the modern Olympic Games. However, he informed petitioners that USOC objected to use of the term "Olympic" in naming and promoting the event, or to label associated merchandise. J.A. 33, 347-48. He informed petitioners that Congress had reserved for USOC the exclusive use of the label "Olympic" as applied to athletic events and for trade purposes. He added that § 110 applies "most particularly with respect to any athletic or purported athletic" events, J.A. 363, and that "[t]o allow your organization to make use of such terminology would dilute the meaning and significance of this event [the Olympic Games], and, I therefore cannot grant authorization for such usage." J.A. 364.

He further explained that "The position of the United States Olympic Committee with regard to the 'Gay Olympic Games' has nothing to do with the issue of homosexuality." J.A. 363; see also *id.*, 131. He pointed out that USOC "takes exception and opposes" such unauthorized uses of the "Olympic" designation, J.A. 364, and the record showed that USOC has consented to use of "Olympic" by only three athletic events: the Special Olympics for the disabled, and the developmental Junior and Explorer Olympics, all of them programs called for in USOC's charter (and, in fact, conducted by constituent members of USOC). J.A. 33, 181; P.C.A. 124 n.6; see Amateur Sports Act § 104, 36 U.S.C. § 374. For all others, it was uncontradicted that USOC "has not authorized and has, without exception, objected to any use of 'Olympic' as a trade name in connection with athletic competitions and events coming to USOC's attention or knowledge," J.A. 33, conducted by "any group," J.A. 34.

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[3] See also *Homosexual Athletic Meet To Open on Coast*, N.Y. Times, Aug. 22, 1982, § 1, p. 25, col. 1.

Initially petitioners, saying they "readily understood" USOC's position, J.A. 96, sent "best wishes," and informed USOC that "we have discontinued the use of the term 'Olympic' to describe our event." J.A. 365, 34. USOC's executive director replied, "I appreciate your response to my request and the position which you have taken, and I wish you well in your venture." J.A. 366. However, soon petitioners wrote again, this time asserting a right under the First Amendment to call their games and products by the name "Olympic." J.A. 367. After additional correspondence, J.A. 371, 373, 376, on learning that petitioners had resumed using the "Olympic" label, J.A. 31, 35, 427, 459, and were publicizing their noncompliance with USOC's request, J.A. 423, 427, 459-60, respondents brought this action pursuant to § 110 to enjoin petitioners from that use.[4] The District Court after hearing (per Conti, J.) granted a temporary restraining order, J.A. 39, and after another hearing (per Peckham, C.J.) a preliminary injunction. J.A. 163.

Petitioners stated that they "readily admit that they have used the combination of 'Gay Olympic Games' to promote, and to sell items . . . ." J.A. 67. Petitioners argued that "the nonprofit status of this defendant is at the crux of our position," J.A. 48, and is "the heart of the matter." J.A. 47. USOC submitted evidence that it derives the bulk of its funds from private donations and licensing of the "Olympic" name and emblem, with licenses raising $40 million in that four-year cycle. J.A. 32. Petitioners also asserted that they were being "selectively prosecuted." J.A. 99. Their stated basis for that belief was that "I know of no other organization, athletic or otherwise, using the term 'Olympic,' having been re-

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[4] The complaint alleged seven causes of action, of which the violation of the Amateur Sports Act was one. J.A. 5-15. Because summary judgment was granted on that count, the District Court never ruled on the other six counts, P.C.A. 116, which included trademark infringement, unfair competition, and violation of the California antidilution statute, CAL. BUS. & PROF. CODE § 14330. Although no occasion arose to rule upon those counts, they were never dropped from the case.

strained from such usage by the USOC." *Ibid.* USOC in reply submitted evidence of a number of court actions it had already brought to stop unauthorized use of the designation "Olympic," as well as several hundred letters sent out to violators requesting them to cease and desist. J.A. 57-58, 383, 388, 392, 395; *id.*, 143, 194, 435. Petitioners acknowledged that such letters had been sent "in many instances." J.A. 51.

The opinion by Chief Judge Peckham noted that the USOC has been a private organization since 1896, federally chartered in 1950. The court discussed the then recently-enacted Amateur Sports Act of 1978, which for the first time had authorized the USOC to bring civil suits to enjoin unauthorized uses of the term "Olympic," replacing criminal penalties previously in the law. P.C.A. 103-06. The court stressed and repeated that the Act "does not establish a *per se* rule against the unauthorized use of the word 'Olympic.' " P.C.A. 108. Rather, the court concluded, the Act granted protection for only a limited "range of uses," P.C.A. 108, 122—so that it was necessary to analyze on the facts of the case whether use of the label "Gay Olympic Games" for the contests and associated retail goods fell within that specified range. P.C.A. 108, 122. The court recognized that petitioners were not using the designation "Olympic" for parody or protest, but rather to label a serious new international athletic event. P.C.A. 109-13; see, *e.g.*, J.A. 421, 425.

> "Further, defendants' plans include Olympic ceremonial events, including the carrying of a torch, an opening parade, and closing ceremonies. Participants will represent their countries or cities and march behind the flags of these at the opening and closing ceremonies." P.C.A. 111-12.

The court found that the "Gay Olympic Games" "though sponsored by the gay community, are open to both homosexuals and heterosexuals," P.C.A. 110, were of "national and international scope," and were "modeled . . . closely in both events and ceremonies to the Olympic Games." P.C.A. 115.

The court also frankly recognized that:

> "Homosexuals have indeed been the victims of discrimination and bigotry in other contexts." P.C.A. 123.

It described petitioners' stated purpose of "creating a more realistic image of homosexual men and women" as a "laudable goal." P.C.A. 112.

The court also found, based on the record, that USOC had not discriminated against petitioners by bringing suit after informal requests had failed.[5] P.C.A. 123-25. The court noted the recency of the civil remedies, the large scale of petitioners' event, and that USOC had pursued and was pursuing other enforcement actions, including litigation, against other violators. P.C.A. 123-25; see J.A. 57-58, 383, 388, 392, 395. It found that "it is not true that USOC has not prosecuted other civil actions under section 380." P.C.A 124-25. The court also concluded that to apply the Amateur Sports Act's prohibition of use of the "Olympic" label in this context would not be unlawfully discriminatory, even if a constitutional equal-protection limitation applied directly to USOC, a proposition as to which the court had "serious doubts." P.C.A. 121.

Plaintiffs appealed the preliminary injunction to the United States Court of Appeals for the Ninth Circuit, which (per Circuit Judges Hug and Harris and District Judge Gadbois) affirmed. P.C.A. 81. The Court of Appeals, while holding that "There is no first amendment right to use the word 'Olympic' in the title of appellants' games," P.C.A. 85-86, emphasized also that "Appellants are not enjoined from making factually correct statements which mention the Olympic games."[6] It also af-

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[5] The record on summary judgment was the same in this respect, except for evidence of additional actions taken by USOC to prevent use of the "Olympic" label. J.A. 216-17, 437, 439, 443, 453; see also *id.* 462.

[6] The District Court had assumed that under § 110 USOC would have to prove a "tendency" to cause confusion, which was less demanding than the Lanham Act's standard of "likelihood," and

firmed the finding that petitioners had failed to show any discrimination in enforcement against them. P.C.A. 86.

Petitioners' 1982 event was held as planned, entitled the "Gay Games I." J.A. 472-73. Petitioners declared that it was "an astounding success," J.A. 474, with 1300 athletes from 12 countries participating. J.A. 475. An even larger "Gay Games II" was held for nine days in 1986, J.A. 477, with approximately 3,400 athletes participating from 17 countries, and the next quadrennial 1990 "Gay Games" are already scheduled for Vancouver, B.C.[7]

In 1984, upon completion of discovery, the District Court (per Vukasin, J.) granted summary judgment for respondents and entered a permanent injunction. J.A. 272; P.C.A. 77. That injunction, which followed closely the text of the statute, did not restrict any of petitioners' athletic activities. It was limited to enjoining petitioners not to use "Olympic" or any term or symbol tending to suggest a connection with the USOC,

> "for the purpose of trade, to induce the sale of any goods or services, or in connection with any advertising, promotion, publicity or production of any theatrical exhibition, athletic performance or competition . . . ." P.C.A. 78.[8]

Petitioners again appealed. A different panel of the Ninth Circuit (Circuit Judges Goodwin and Wallace and

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which the court after review of the planned uses found to be so apparent on the facts that it could be "presumed." P.C.A. 114-15. The Court of Appeals, after analyzing the text and legislative history of § 110, P.C.A. 87-90, concluded that with respect to use of the designation "Olympic," very likely no showing of a tendency to cause confusion was required by the statute. P.C.A. 90.

[7] Petitioners' 1982 budget was $400,000, J.A. 477; their budget ifor 1986 was "magnitudes larger." *Ibid.* See Bishop, *"Olympic" Games Seen as Balm for AIDS Fear*, N.Y. Times, Aug. 17, 1986, § 1, p. 31, col. 1; Los Angeles Times, Aug. 18, 1986, § 1, p. 2, col. 6. In promoting these ventures, petitioners raffled off tickets to respondents' Olympic Games. J.A. 477-78.

[8] The District Court also dismissed petitioners' counterclaims and denied petitioners' demand for USOC to pay them attorneys' fees. P.C.A. 79; J.A. 172.

Senior District Judge Stephens) again affirmed. The Court of Appeals reviewed the purpose of the Amateur Sports Act and explained that

> "It is uncontested that SFAA used 'Olympic' in the promotion of its games. This use involved not only the advertising of the games, but the selling of products with the word 'Olympic' on them." P.C.A. 4.

It held that when Congress in 1978 repealed the former criminal sanctions for use of "Olympic" in trade and for athletic contests, and substituted instead a civil cause of action, Congress meant, as it had in a 1950 criminal statute, to protect against unauthorized use of the "Olympic" designation for athletic or trade purposes, without confining the prohibition to cases of possible confusion. P.C.A. 5-7. Congress intended to protect the market value of licenses that USOC might grant for such use of the "Olympic" designation, and thereby safeguard USOC's ability to raise money. P.C.A. 6-8.

The Court of Appeals once more rejected petitioners' argument that the Act of Congress granting exclusive athletic and commercial use of the label "Olympic" to USOC was unconstitutional. The Court held that, as in actions for infringement of copyrights or trademarks, the statutory labeling protection did not violate the First Amendment, P.C.A. 11-13, and that calling on courts for enforcement against violations did not constitute objectionable governmental action. The Court of Appeals also examined the injunction, emphasizing that "review of a permanent injunction is stricter" than for preliminary relief. P.C.A. 14. It concluded that "providing injunctive relief was not, given SFAA's past use of the protected words and symbols, an abuse of discretion," and that the injunction "merely tracks the statute" and was not overbroad. P.C.A. 15.[9]

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[9] The Court of Appeals reversed the District Court's award of attorneys' fees to respondents, and remanded for further findings. Respondents did not cross-petition and have not sought review of that aspect of the case.

Petitioners then sought rehearing *en banc*, which was denied, with Judge Kozinski, joined by two other judges, dissenting. Although emphasizing that "I find it difficult to reach any but the most tentative conclusions," and "I do not necessarily conclude that the Amateur Act is irreconcilably at odds with the first amendment," P.C.A. 48, he expressed the "tentative" view that "By passing the Act, Congress extracted a word from the English language and gave it to a private party to use in connection with any commercial endeavor or public event." P.C.A. 31. As he characterized the case, "What appellants challenge is the power of Congress to privatize the word Olympic, rendering it unutterable by anyone else in connection with any product or public event, whether for profit or, as in this case, to promote a cause." P.C.A. 36. Judge Kozinski also contrasted USOC's policy of authorizing the Special, Junior, and Explorer Olympics, and criticized USOC's failure to bring litigation against organizers of the "Police Olympics." P.C.A. 40. He concluded that "Accepting SFAA's allegation, as we must, it seems that the USOC is using its control over the term Olympic to promote the very image of homosexuality that the SFAA seeks to combat." P.C.A. 40. This Court granted certiorari.

SUMMARY OF ARGUMENT

This case does not involve any interference with petitioners' unfettered right—now successfully exercised both in 1982 and again in 1986—to hold a serious week-long international athletic competition, with thousands of participants, tens of thousands more spectators, and international press and television coverage, consciously modeled on the modern Olympic Games. Nor does this case involve removing any word from the English language, if such a thing were possible. All that is at issue here is whether petitioners can identify and promote a new, large quadrennial international athletic event as the Gay "Olympic" Games, and whether they can raise money by

selling T-shirts, souvenirs, and a host of trade paraphernalia bearing the word "Olympic." The dispute is about use of a label, and whether petitioners have a constitutional privilege to appropriate it for their products and services.

Congress in 1950 prohibited new uses of the designation "Olympic" for trade and athletic contests except those licensed by the United States Olympic Committee. In the Amateur Sports Act of 1978, Congress hoped to encourage amateur sports and foster development of U.S. amateur athletes for international competition. But Congress left USOC with the task of raising privately the funds needed to achieve those objectives. Congress anticipated that, by licensing of "Olympic" and the five-ring symbol, USOC would be able to raise funds for its activities and for expenses of U.S. amateur athletes, and that by civil enforcement actions, if necessary, it could preserve its good will and the value of such licenses. "[I]f the USOC could not grant exclusive rights . . . the USOC would find itself unable to raise the funds required for participation in the Olympic Movement." *USOC* v. *Intelicense Corp.*, 737 F.2d 263, 266 n.3 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984).

The Amateur Sports Act's provision for a civil cause of action covered the same unauthorized uses of the "Olympic" label that had been criminally prohibited in 1950: for sale of goods or services, or an athletic competition. Congress in this special statute plainly intended to define a particular limited category of misappropriation. It was not simply reiterating the Lanham Trademark Act's infringement protection, which is limited to proof of "likelihood of confusion." USOC already had such protection, having held a registered trademark and service mark on the word "Olympic" for many years.

A clearer violation of the statute than occured here is difficult to imagine. Yet petitioners assert first of all that, in spite of its history and of Congress' emphasis in

the 1978 statute that USOC's right to the designation "Olympic" should be "exclusive," nevertheless the 1978 Act should be read to confer no rights that USOC did not already have as a result of its existing trademark. That argument—that Congress really accomplished nothing in 1978—is refuted by text, history, and common sense.

More importantly, petitioners claim a privilege to ignore the Congressional mandate. They argue that the Act of Congress reserving exclusive use of the "Olympic" label for athletic contests and trade goods to USOC violated the First Amendment. They seek to conjure a vision of shadowy censors snipping words from dictionaries, or of reporters and commentators gagged so they may not utter an offending term. Such fancy has nothing to do with this case.

No case of this Court has ever hinted that Congress (or the states) may not protect against many forms of competitive practices, including misappropriation. See *International News Services* v. *Associated Press*, 248 U.S. 215 (1918). Also, this Court has held that they can regulate trade names. *Friedman* v. *Rogers*, 440 U.S. 1 (1979). Here, moreover, Congress has substantial and unusually explicit reasons of public policy for doing so: in order to assure that USOC, by funds raised from licenses and contributions based on respondents' good will, would be able to continue to develop amateur athletes and to finance the participation of teams from the United States in the Olympic Games. Prohibiting nothing more than the use of USOC's label "Olympic" for petitioners' products and paid sports event was a narrow and clearly focused regulation of commercial expression that fits easily within the criteria explained by this Court in *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980).

Seeking to avoid a test they cannot meet, petitioners ask this Court instead to treat their appropriation of USOC's "Olympic" label for their goods and athletic games as a speech activity to be judged by non-commer-

cial standards. Because petitioners admittedly were not seeking to comment on the Olympic Games as such, how they can by *fiat* make their paid-admission contests, fund-raising and sales activities non-commercial is unclear. But even by the non-commercial standard, the Amateur Sports Act's very limited restriction is well within what is permissible.

The Act is totally content-neutral. Petitioners remain free to say what they want and do what they want, as long as they do not misappropriate for their competition and products the "commercial magnetism" of the "Olympic" label. *Mishawaka Rubber & Woolen Mfg. Co.* v. *S.S. Kresge Co.*, 316 U.S. 203, 205 (1942). They have in fact availed themselves of that wide range of alternatives, and for nearly five years have promoted their Games and sales activities, without using "Olympic," with great success. The narrow labeling restriction here, placing no real burden on free expression, meets the standards of *United States* v. *O'Brien*, 391 U.S. 367 (1968), and is analytically correlative to the time, place and manner restrictions on showing of adult movies, on sound trucks, and such. *Cf. City of Renton* v. *Playtime Theatres, Inc.*, 106 S. Ct. 925 (1986); *Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789 (1984).

The holding that petitioners seek would eradicate not just this statute—and with it the funding of the U.S. Olympic effort—but dozens of other Congressional enactments protecting other designations as well. It would also call into doubt many state laws prohibiting misappropriation of labels, trademarks, and other commercially valuable material, plus "antidilution" unfair-competition statutes enacted in nearly half the states, including the major trade centers of this country.

Petitioners' final argument is that they are the victims of unconstitutional "selective prosecution." But there are two insuperable obstacles to the ruling they seek. The first is, the record and findings below are wholly to the contrary: USOC since 1978 has proceeded time and again, both informally and by litigation, to pre-

vent unauthorized users of every description from misappropriating the "Olympic" label. Petitioners insist on believing that someone has it in for them. What they fail to recognize is that use of that label for their new international athletic event, with solicitations of contributions and associated sales of retail goods, was the most substantial violation of its kind on record.

Because the record shows no singling out of petitioners, it is not necessary to reach petitioners' argument that decisions by USOC to enforce its statutory rights are governmental action subject to attack on equal-protection grounds. The implications of that argument obviously would be revolutionary. There is no need or basis after nearly forty years to expand the unique ruling in *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), and to convert all private enforcement decisions into state action. And this Court's prior cases demonstrate that the fact that USOC's corporate charter is federal, that it has legal duties imposed upon it, and that what it does serves a good public interest, does not make USOC an arm of the state. *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982); *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974).

ARGUMENT

I. CONGRESS WITH EXCELLENT AND ADEQUATE REASONS RESERVED TO USOC EXCLUSIVE RIGHTS TO THE TERM "OLYMPIC" FOR LABELING ATHLETIC CONTESTS AND TO INDUCE THE SALE OF GOODS OR SERVICES.

A. The Amateur Sports Act by Its Terms Grants USOC a Right to the Label "Olympic" for Sales and for Athletic Contests.

"Statutory construction must begin with the language employed by Congress . . . ." *Park 'N Fly, Inc.* v. *Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985); *accord*, *Bread Political Action Committee* v. *FEC*, 455 U.S. 577, 580 (1982). Section 110 of the Amateur Sports Act of 1978, 92 Stat. 3048, codified as 36 U.S.C. § 380, p. 1a, *infra*, is unusually clear. It provides for USOC to "authorize contributors and suppliers of goods" to use pro-

tected Olympic designations or symbols. § 110(b), 36 U.S.C. § 380(b). And it deals with the "Olympic" designation in two separate places. The statutory language first says:

> "(a) Without the consent of the Corporation [the USOC], any person who uses for the purposes of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition—
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> * * * *
>
> "(4) the words 'Olympic', 'Olympiad', 'Citius Altius Fortius', or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity;
>
> shall be subject to suit in a civil action by the Corporation for the remedies provided in the Act of July 5, 1946 (60 Stat. 427; popularly known as the Trademark Act of 1946)."

Then separately, in a different clause, the statute reiterates:

> "(c) The Corporation shall have exclusive right to use . . . the words 'Olympic', 'Olympiad', 'Citius Altius Fortius' or any combination thereof subject to the preexisting rights referred to in subsection (a)." [10]

Petitioners urge that the statutory language and its "ordinary meaning" "*require* this Court to interpret Congress' intent as one bestowing nothing more than a trademark upon USOC." P. Br. 22 (emphasis supplied). That is nonsense.[11] Such a law would have served no purpose at

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[10] The "preexisting rights" are a "grandfather" clause that exempts from liability under § 110 "any person who actually used" protected designations including "Olympic" prior to the 1950 act, or used "simulations thereof tending to cause confusion" prior to the enactment of the 1978 Act.

[11] Even petitioners' *amici* do not go so far. Instead, *amici* argue simply that "the wording used by Congress is very complex and ambiguous." A. Br. II 24.

all. USOC had already for many years held a registered trademark and a registered service mark which had become incontestable on "Olympic." J.A. 378-82. It had all the rights of a trademark holder already available. Plainly the statute does more. It allocates to USOC in section (a) (4) an additional right to sue to enjoin "any person who uses" the designation "Olympic" "for purposes of trade, to induce the sale of any goods or services, or to promote any . . . athletic performance or competition." [12]

Petitioners also, by ignoring the usual rules of English punctuation, assert that the phrase in section (a) (4) "or any combination or simulation thereof tending to cause confusion" should be read so that the "tending to cause confusion" phrase would also modify the earlier word "Olympic," and thus place on USOC the burden of proving in every case a tendency toward confusion (meaning, as a practical matter, many more expensive trials). As a technical grammatical matter, that is erroneous, because if the statute had so provided, then a comma should have followed "thereof." More importantly, such a strained reading would not square with the separate reiteration in section (c) (which petitioners do not discuss) that USOC is to "have the exclusive right to use . . . the word 'Olympic' . . ." [13] The parts, and the totality, of the statutory language cannot fairly be read, as petitioners assert, "to require USOC to prove trademark infringement." P. Br. 20. Like the incontestability provisions of the Lanham Act, this "plain language" of the statute

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[12] The four subsections of § 110 protect, respectively, in § (a) (1) the Olympic five-ring symbol; in § (a) (2) the USOC Olympic emblem; in § (a) (3) against use of trademarks or trade names falsely representing association or endorsement by IOC or USOC; and in § (a) (4) "Olympic" and other designations. Although the courts below did not reach the point, the record establishes a violation of § (a) (3), as well as of § (a) (4)'s broader protection.

[13] Subsection (c), unlike subsection (a) (4), is confined to the original 1950 act's "Olympic" designations, omitting "simulation." Notably, in omitting that newly added term, it also omits the accompanying modifying phrase "tending to cause confusion."

"cannot be attributed to inadvertence by Congress." *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., supra*, 469 U.S. at 197.[14]

B. The Legislative History Confirms That Congress Did Not Limit Protection to Cases Involving Confusion.

If the statute were ambiguous, the next step would be to examine the legislative history, which petitioners cite only once in passing. P. Br. 20. They rely more on repeated assertions that Congress must have intended the kind of statute they advocate—one that would "require USOC to prove trademark infringement," P. Br. 16, 22, with its many limitations, defenses, and litigative pitfalls.[15] But any fair examination of the legislative history shows otherwise. Congress had every reason not to force USOC to a trial on the issue of potential confusion every time it sought to stop an unauthorized "Olympic" designation. Congress was concerned about the Olympic Games. It was not tinkering with a trademark statute.[16]

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[14] The very introduction of the word "tending" with respect to combinations or simulations shows that Congress was not following the Lanham Act, whose infringement standard is the different one of "likelihood" of confusion. See 15 U.S.C. § 1114.

[15] Petitioners recognize why they must take the position they do. They concede:

> "After all, *if as USOC contends, Congress' real purpose in enacting 380* [§ 110] *was to provide a 'new cause of action* [for] protection for Olympic-related designations apart from the protection provided by the Federal Trademark Act (footnote omitted),' *trademark infringement defenses then logically would not apply under section 380.*" P. Br. 25-26 (emphasis supplied).

[16] Congress when it wanted to incorporate Lanham Act defenses into new legislation has said so explicitly. See, *e.g., Trademark* Counterfeiting Act of 1984, § 1502(a), 98 Stat. 2178, 2179, 18 U.S.C. § 2320(c) ("All defenses, affirmative defenses, and limitations on remedies that would be applicable in an action under the Lanham Act shall be applicable in a prosecution under this section."). Congress also in many other provisions has explicitly distinguished § 110 of the Amateur Athletic Act from the Lanham Act. See, *e.g.*, 15 U.S.C. § 1116(d)(1)(A); contrast 15 U.S.C. § 1116(d)(1)(B)(i) with (ii); 15 U.S.C. § 1117(b); 18 U.S.C. § 2320(d)(1)(B).

The 1950 criminal statute had flatly prohibited

> "any person . . . other than [USOC] . . . for the purposes of trade, theatrical exhibition, athletic performance, and competition or as an advertisement to induce the sale of any article whatsoever or attendance at any theatrical exhibition, athletic performance, and competition or for any business or charitable purpose to use . . . *the words 'Olympic', 'Olympiad', or 'Citius Altius Fortius' or any combination of these words:* . . ." Act of Sept. 21, 1950, ch. 973, 64 Stat. 899, 900 (emphasis supplied), p. 3a, *infra*.

That criminal statute made no provision for trademark infringement defenses. Congress when it drafted § 110 had no intention of retreating from that prohibition.

USOC agrees with *amici* that the most "illuminating," A. Br. II 16, explanation of § 110(a)(4) is a letter from the Commissioner of Patents and Trademarks, responding to a request for "drafting assistance," that was cited in the committee report as the basis for the final wording of § 110. See H.R. Rep. No. 95-1627, 95th Cong., 2d Sess. 15, 36-39 (1978).

The letter begins by confirming that the 1950 act "prohibits unauthorized use of . . . the words 'Olympic,' 'Olympiad', or 'Citius Altius Fortius.'" It then explains that beyond those, § 110 of the new law "would *add* to the list of designations whose unauthorized use is prohibited . . .

> "(3) a combination, simulation, or confusingly similar derivation of the words 'Olympic', 'Olympiad', or 'Citius Altius Fortius' which would tend to cause confusion, mistake or deception, or which would falsely suggest a connection with the Corporation or any Olympic activity." *Id.* at 37 (emphasis supplied).

In other words, the provision regarding tendency to cause confusion clearly referred only to the *added* prohibition, and not to the preexisting prohibition of "Olympic" to which it was added.

If any doubt could remain, it is dispelled by the letter's further statement that

> "Section 110 carries forward some prohibitions from the existing statute enacted in 1950 and adds *some new prohibitions*, e.g. words described in section (a) (4) tending to cause confusion, to cause mistake, or to deceive with respect to the Corporation or any Olympic activity." *Id.* at 38 (emphasis supplied).

As the act accordingly was drafted and enacted, section 110(a) (4) provided a civil remedy for unauthorized use of

> "the words 'Olympic', 'Olympiad', 'Citius Altius Fortius', or any combination *or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity.*" (Emphasis supplied.)

There is simply no way fairly to read that legislative history—not to mention the ordinary rules of punctuation—and not conclude that the "tending to cause confusion" language relates only to the added "or simulation" clause of which it was a part.

But if any doubt still remained after that, there is still more explanation in the letter to end it. The Commissioner pointed out to the Committee that as drafted, with the 1950 criminal prohibition repealed, the bill contained a loophole that would allow persons to register "Olympic" trademarks with the Trademark Office, and force the Trademark Office to show likelihood of confusion or deception before it could deny registration. Emphasizing that under § 110 proof of "confusion" was *not* to be required, *id.* at 38, the Commissioner's letter concluded,

> "we propose that a new subsection (c) be inserted to read:
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> > "The Corporation shall have exclusive right to use the name 'United States Olympic Committee'; the symbol described in subsection (a) (1); and the emblem described in subsection (a) (2); and the words 'Olympic', 'Olympiad', 'Citius Altius Fortius' or any combination thereof subject to

> the pre-existing rights [grandfather clause] described in subsection (a)."

Congress did so.

Amici's other arguments are just as severely flawed. Forced to acknowledge that Congress evinced no intention in 1978 of cutting back the protection it had enacted in the criminal section of 1950, they assert that "By enacting the prior [1950] statute, Congress was concerned only with preventing false representations and fraud," citing a brief committee report. A. Br. II 10; see S. Rep. No. 2523, 81st Cong., 2d Sess. 2 (1950). What *amici* ignore is that section 9 of the 1950 act had *two different* sentences with *two separate* prohibitions. The first, indeed, dealt only with fraud. The second, however—the one relevant to this case—prohibited *any* unauthorized use of the Olympic name and symbols, "for the purpose of trade, theatrical exhibition, athletic performance, and competition or as an advertisement . . . ." *Id.*, § 9, 64 Stat. 901, *infra* p. 3a.

Their remaining argument is that the version of the Amateur Sports Act which passed the Senate spelled out a long list of remedies available to USOC, a list that duplicated the typical remedies for trademark infringement. In the House version this list was deleted and a brief phrase substituted that simply incorporated by reference all the remedies available to trademark owners under the Lanham Act. From this laudable simplification of drafting, *amici* ask this Court to infer a major—but nowhere mentioned—substantive change intended to turn the USOC section into just a repetition of the entire Lanham Act, incorporating all infringement defenses as well as remedies.[17] Obviously, the technical staff merely

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[17] Shorthand floor reference to USOC being empowered to sue civilly "pursuant to the Lanham Act," A. Br. II 22, cannot overcome the statutory language, especially as explained so thoroughly by the Commissioner of Patents and Trademarks, see pp. 18-19, *supra*. In context, the obvious reference was simply to the substitution of civil for criminal remedies. There remain, of course, all the

was avoiding a redundant listing of remedies by the common technique of incorporation by reference.[18]

C. Administrative Rulings and Court Decisions Have Uniformly Held That Protection for the "Olympic" Label Exceeds That for Trademark Infringement.

A number of court decisions have examined the text, purpose, and history of § 110. Every one of them has come to the same conclusion as the Court of Appeals twice did below. None has accepted petitioners' invitation to read the statute so as to leave it a purposeless redundancy. "The scope of protection afforded by . . . [§ 110] is broader than trademark protection, and is more akin to that of an antidilution statute." *United States Olympic Committee* v. *International Federation of Bodybuilders*, 219 U.S.P.Q. 353, 360 (D.D.C. 1982). "[T]o sus-

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usual equitable defenses; for example, the court below did not dismiss petitioners' defense of laches, but considered it fully. Whether a use is in trade or for sales can also be a defense; see *Stop the Olympic Prison* v. *USOC*, 489 F. Supp. 1112 (S.D.N.Y. 1980). So can the statute's "grandfather" clause.

[18] *Amici* argue also that the 1978 Act should be read as doing no more than reiterating ordinary trademark protection and "placing the Committee on an equal footing with other federally chartered organizations." A. Br. II 28. This proceeds from a false premise. Although some cases involving symbols of other organizations have found confusion, only one suggested they would be limited to such situations; that case involved no economic effect, and the statute and legislative history were different from here. *Girl Scouts* v. *Personality Posters Mfg. Co.*, 304 F. Supp. 1228, 1232 (S.D.N.Y. 1969); 36 U.S.C. § 36. Several cases have held, even without reliance on statutory exclusive rights, that the "scout" designation would be protected even without any showing with respect to possible confusion. See *Adolph Kastor & Bros.* v. *FTC*, 138 F.2d 824 (2d Cir. 1943) (L. Hand, J.); *Boy Scouts* v. *Winchester Repeating Arms Co.*, 5 T.M.R. 142 (1926); *cf.* also *Triangle Pubs., Inc.* v. *Rohrlich*, 167 F.2d 969 (2d Cir. 1948). Moreover, Congress in 1978 was changing the remedies for the flat prohibition on use of "Olympic," which had been in the law since 1950; its stated purpose of the 1978 act was to make USOC's protection greater and more effectively enforceable. See H.R. Rep. No. 95-1627, 95th Cong., 2d Sess. 6-17, 15 (1978).

tain an injunction under 36 U.S.C. § 380(4) as to the use of the word 'Olympic,' no showing of a tendency to cause confusion, mistake or deception is necessary; it is only the 'combination or simulation' which must have such a tendency." *International Sports Marketing, Inc.* v. *International Olympic Committee* (D.Vt. 1984) (Oakes, Cir. J.), p. 11a, *infra.*

As the Second Circuit held in *USOC* v. *Intelicense Corp.*, 737 F.2d 263, 267 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984):

> "Intelicense urges, absent an iota of support in the statute or case law, that we incorporate the more restrictive 'likelihood of confusion' standard into the provisions of § 380 [§ 110]. The upshot of this claim would be to supplant the 'use without the USOC's consent' standard expressly set forth in § 380, and dramatically constrain the effective scope of the statute, as well as to frustrate the Act's unequivocal purpose. *We are in agreement with the cogent analysis* provided by one court [the District Court in the present case, P.C.A. 91-127], which stated that *'Congress must have meant to place less of a burden on a plaintiff under a section 380 cause of action* than that placed upon a plaintiff suing under the Trademark Act alone.'" 737 F.2d at 267 (emphasis supplied).

Petitioners' brief does not cite the *Intelicense* case.

This unvarying line of judicial decisions is completely consistent with the interpretation of § 110 by the cognizant expert administrative tribunal, the Trademark Trial and Appeal Board of the U.S. Patent and Trademark Office, the same agency Congress consulted in drafting the statute. See pp. 18-20, *supra.* In *United States Olympic Committee* v. *Wilson Distributing Co.*, Opp. No. 70,684, (Pat. T.M. Off. T.T.A.B. 1986), p. 7a, *infra*, the Board held that "while 'likelihood of confusion' is the standard to be applied in oppositions based upon Section 2(d) of the Trademark Act of 1946, . . . no such standard is laid down in 36 U.S.C. § 380(c) . . .," and that USOC's "exclusive right to use 'Olympic' is unconditional." It also ruled, agreeing with all the courts below, that

"Lanham Act defenses are not available to a defendant in a proceeding based upon the Amateur Sports Act."

II. CONGRESS DID NOT VIOLATE THE CONSTITUTION IN RESERVING THE "OLYMPIC" LABEL FOR SALES AND FOR ATHLETIC CONTESTS TO USOC.

Petitioners adopt the broad proposition of the opinion dissenting from denial of rehearing below that by reserving specified uses of the label "Olympic" to USOC, Congress violated the First Amendment or other constitutional provisions. But by every known test, and certainly on the facts of this case, the text, purpose and values of the Constitution, including the First Amendment, have been respected.

A. Protecting USOC's Use of the "Olympic" Label To Raise Funds Was Clearly a Valid Objective Within Congress' Legislative Power.

There can be no question of Congress' power under the Commerce Clause to enact the Amateur Sports Act, nor of its good reasons for doing so. A Presidential Commission had concluded that "In international sport . . . American performances are deteriorating."[19] Congress sought in 1978, as it had in 1950, to help the situation.[20]

In § 110(b) of the Amateur Sports Act, Congress gave an affirmative grant of marketing rights to USOC, and in § 110(c) protection against competing trademark registrations. Those rights are valuable and are USOC's principal source of financial support. J.A. 34, 32.[21] And

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[19] FINAL REPORT OF THE PRESIDENT'S COMMISSION ON OLYMPIC SPORTS 1975-1977 1 (1977). Noting "poor organization and funding," it favored "a body having limited powers, leaving local matters to local knowledge, and deriving its authority from the consent of the governed." *Id.* at 11, 13.

[20] In 1950 Congress had noted that "without the [USOC], the United States would be unable to participate in the Olympic Games." S.Rep. No. 2523, 81st Cong., 2d Sess. 1 (1950).

[21] See *USOC* v. *Millsport, Inc.*, No. 83-278 (D. Vt. 1983), *aff'd sub nom. USOC* v. *Intelicense Corp.*, 737 F.2d 263 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984), p. 32a, *infra*.

recognizing that criminal remedies had proved impractical, Congress in 1978 also substituted an independent civil action to prevent the appropriation of specified Olympic designations, confined to a narrow range of uses: inducing the sale of goods or services, or promoting any theatrical exhibition, athletic performance or competition. This range of protected uses bears a direct and rational relationship to the purposes for which the USOC was chartered, and to its need to secure and protect its sources of funding.

> "The fundamental purpose of that Act was to safeguard the USOC's ability to raise the financial resources that are a critical component of America's capacity to send world-class amateur athletes into international competition without the massive government subsidies enjoyed by competitors from other nations.
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> "It is clear that the Congressional intent in enacting § 380 [§ 110] was to promote the United States Olympic effort by entrusting the USOC with unfettered control over the commercial use of Olympic-related designations." *USOC* v. *Interlicense Corp.*, *supra*, 737 F.2d at 264, 266.

Petitioners argue that Congress has no power to protect trade designations other than by allowing traditional trademark infringement actions, based on likelihood of confusion, mistake or deception, and limited by all statutory defenses contained in the Lanham Act. The dissent from denial of rehearing below even assumed that § 110 "stakes out an intellectual property fiefdom quite unlike any thing we have seen in our law before." P.C.A. 39. That is simply incorrect. The law abounds with examples of trade protections that go beyond trademark infringement. Even the Lanham Act itself is not confined to trademark infringement, and in § 43(a), 15 U.S.C. § 1125(a), prohibits a "broader range of practices . . . as may the state unfair competition law." *Inwood Labs. Inc.* v. *Ives Labs. Inc.*, 456 U.S. 844, 858 (1982).

This Court has long recognized that even in the absence of a statute, and without any showing of confusion, a remedy may be provided for the misappropriation of one's commercially valuable property by another. *International News Service* v. *Associated Press*, 248 U.S. 215 (1918);[22] *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). It has long been recognized also that Congress can by statute prospectively reserve a trademark or trade name to a particular user, even if the term had long been in use by others. In the words of Judge Learned Hand, "the question of policy was for it [Congress] and it alone, and it is now finally closed." *Loonen* v. *Deitsch*, 189 Fed. 487, 492 (S.D.N.Y. 1911) (red cross). In *FTC* v. *A.P.W. Paper Co.*, 328 U.S. 193 (1946), this Court expressed no doubts whatsoever about the validity of the "Red Cross" statute,[23] stating that Congress was concerned both with protecting the public and "with protecting the Red Cross from pretenders." *Id.* at 201. This was in spite of arguments, almost identical to those made by petitioners here, that the words "red cross" "were in common usage in the English language for at least four hundred years

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[22] Even the separately writing Justices in the famous *INS* case, who objected to recognizing a misappropriation action at common law, emphasized that the legislature if it chose could create such a property right. See 248 U.S. at 248 (Holmes, J., concurring); *id.* at 266 (Brandeis, J., dissenting). "The law of trade-marks is but a part of the broader law of unfair competition . . . ." *United Drug Co.* v. *Rectanus Co.*, 248 U.S. 90, 97 (1918).

[23] The statute considered there was strikingly similar to both § 110 and its 1950 predecessor:

> "it shall be unlawful for any person, corporation, or association other than the American National Red Cross . . . for the purpose of trade or as an advertisement to induce the sale of any article whatsoever or for any business or charitable purpose to use within the territory of the United States of America . . . the emblem of the Greek Red Cross on a white ground, or any sign or insignia made or colored in imitation thereof or of the words 'Red Cross' or 'Geneva Cross' or any combination of these words." Act of Jan. 5, 1905, § 4, 33 Stat. 599, 600, as amended, 36 Stat. 604 (1910).

prior to 1864," and that "[t]he use of a red cross as a trade-mark on medical products was quite natural." Brief Amicus Curiae of Johnson & Johnson, No. 320, OT 1945, 10, 14.[24]

Petitioners' assertion that "generic words cannot be trademarks," P. Br. 32, is inapposite on the facts of this case, and incorrect if intended as a statement of Congress' constitutional power. "Olympic" in 1978 had long been a registered mark. J.A. 31, 378-82. Moreover, "generic" or "descriptive" are simply concepts of traditional trademark law that in a context like the present one Congress is free to follow or not.[25] In granting protections to trade designations, Congress exercises wide choice under its commerce power. See *Park 'N Fly, Inc.* v. *Dollar Park and Fly, Inc.*, *supra*, 469 U.S. at 197-202.[26]

Similarly, the Commerce Clause does not require originality or first use. Even if it did, IOC and USOC are in fact creators—creators of the modern Olympic Games with their accompanying format, ceremonies and rituals, see pp. 24a-31a, *infra*, and it is their Twentieth-Century product that Congress meant to encourage. It was the modern Olympic Games, and not some tale from ancient times, that petitioners consciously copied. It was the modern "Olympic" designation that Congress could pro-

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[24] See also *Girl Scouts* v. *Hollingsworth*, 188 F. Supp. 707, 711 (E.D.N.Y. 1960) (rejecting argument that "a restriction on the use of the word 'Scout' is a breach of the freedom of the press and of expression and of the free usage of the English language.").

[25] *Canal Co.* v. *Clark*, 13 Wall. 311 (1872), dealt with common-law trademarks, not Congressional power.

[26] Even the dissent in *Park 'N Fly* recognized that such words may be used "unless Congress instructs otherwise." 469 U.S. at 215 (dissenting opinion). *Anti-Monopoly, Inc.* v. *General Mills Fun Group, Inc.*, 684 F.2d 1316 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983), relied on at P. Br. 32, did not assert any constitutionally-based principle. In fact, it was severely criticized and overruled by Congress. Trademark Clarification Act of 1984, §§ 102, 103, 98 Stat. 3335; see S. Rep. 98-627, 98th Cong., 2d Sess. (1984).

tect, just as it did the "red cross" name and label in spite of ancient antecedents. *FTC* v. *A.P.W. Paper Co., supra.*

More than possible confusion as to sponsorship—obvious as that risk was here—was at stake. Congress had ample basis to conclude that uncontrolled commercial exploitation of "Olympic" could damage its objectives in at least three respects:[27] through uncontrolled proliferation and "market clutter,"[28] it would (1) deprive USOC of the ability to raise funds to finance participation in the Olympics pursuant to § 105(a)(3), 36 U.S.C. § 375(a)(3); (2) interfere with the ability to protect good will and the value of licenses by controlling the manner in which they are used and the nature and quality of products and services marketed with Olympic designations;[29] and (3) impede exclusive corporate sponsorship arrangements, because of direct conflicts or diminished attractiveness of Olympic-related designations. What is available free, no one will pay for.

Certainly it was not unreasonable for Congress also to conclude that the "Olympic" label should be protected without placing on USOC the burden of litigating the Lanham Act issue of "likelihood of confusion" every time a new violation occurred. Petitioners disagree with that policy, and complain that Congress to help amateur sports gave USOC "an unjustified advantage," P. Br. 27, one that respondents "do not deserve." A. Br. II 6. "At bottom, . . . [petitioners' brief] simply disagrees with the balance struck by Congress." *Park 'N Fly, Inc.* v. *Dollar Park and Fly, Inc., supra,* 469 U.S. at 202.

Congress wanted to be sure that USOC would be able to continue to raise enough private funds to continue to finance U.S. amateur athletes' participation in the Olym-

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[27] See *USOC* v. *Millsport, Inc., supra* n. 21, p. 34a, *infra.*

[28] See, *e.g.*, Brown, *Advertising and the Public Interest: Legal Protection of Trade Symbols,* 57 Yale L.J. 1165, 1191-94, 1199-1201 (1948).

[29] *E.g.*, petitioners allowed "Gay Olympic Games" to be used in liquor advertising, J.A. 399, contrary to IOC rules. P. 24a, *infra.*

pic Games. And the last thing Congress wanted was for the limited resources of USOC to be dissipated on repetitious extended litigation over issues like possible confusion.[30]

B. A Statute Providing Legal Protection for Use of a Designation To Sell Goods or Services, or for an Athletic Contest, Does Not Violate the First Amendment.

1. *The Statute Is a Limited and Valid Regulation of Commercial Speech.*

The use of "Olympic" involved here is commercial speech.[31] The injunction applies, as does the statute, to using that designation for sales of goods and services or to label athletic contests—the very uses that threaten USOC's fund-raising ability.

Commercial speech, this Court has made plain, is entitled to some constitutional protection, but only some. *Virginia State Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). A regulation of commercial speech is valid if it meets the four criteria set forth in *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980), and reiterated most recently in *Posadas de Puerto Rico Associates* v. *Tourism Co.*, 106 S. Ct. 2968 (1986). (1) First, in order for the First Amendment to apply at all, the speech must concern a lawful activity and not be misleading or fraudulent. Although the issue was not addressed below, petitioners' use of the word "Olympic" here could have been held misleading as a matter of law, implying a nonexistent affiliation with the Olympic Games. *Cf.* § 110(a)(3); *Adolph Kastor & Bros.* v. *FTC*, 138 F.2d 824 (2d Cir.

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[30] Because § 110 provides for the remedies of the Lanham Act, attorneys' fees "may" be awarded to USOC. 15 U.S.C. § 1117. However, recovery of such expenditures is by no means certain, as is evidenced by the Court of Appeals' reversal of the attorneys' fees award in this case. See P.C.A. 22.

[31] See Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 WIS. L. REV. 158, 193.

1943). The potential for such deception is sufficient basis for regulation. *Friedman* v. *Rogers*, 440 U.S. 1 (1979).[32]

Moreover, petitioners have failed to satisfy the other criteria of *Central Hudson Gas*. (2) The governmental interest in regulating must be substantial. Here it undoubtedly is. The Olympic Games are of great public interest worldwide, and Congress could and did rationally decide that they in some way can affect the perception of the United States abroad. The legislative history of the Amateur Sports Act of 1978 reiterates repeatedly the Congressional interest in encouraging U.S. amateur athletes to aspire to such competition. (3) The regulation must directly advance that governmental interest. The regulation here, and the injunction, are carefully tailored to Congress' clearly stated purpose of assuring the fund-raising capability of USOC, by allowing it the exclusive use of "Olympic" to label licensed trade items and athletic contests, to reserve the trade value of "Olympic" to USOC. (4) Finally, the regulation must be no more extensive than necessary to serve that interest. Here it is narrow, indeed. Petitioners are not restricted in any way in what they do or in what views they express. All that they are limited from doing is appropriating for sale of goods and services and for their international athletic contest the label "Olympic."[33]

Nowhere to be found in petitioners' brief is *Friedman* v. *Rogers*, *supra*. There this Court held that trade names

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[32] Petitioners' assertion that they never used "Olympic" without "Gay," P. Br. 6, does not alter the violation, and moreover is abundantly contradicted by the record. *E.g.*, J.A. 353, 361 ("Olympic Committee"); 359 ("Olympic emblem"); 358 ("The Olympic Office"); 360, 362 ("Olympic poster" and "Olympic T-shirt"); 361 ("Olympic Headquarters" and "Olympic Flag Corps"); 402 ("Olympic flame"); 403 ("Olympic medal"); 404 ("OLYMPICS '82"); 416 ("OFFICIAL OLYMPICS ENTERTAINMENT"). Petitioners also sought to register for themselves the corporate name "Golden Gate Olympic Association." J.A. 95, 349.

[33] This Congressionally planned and explicitly limited labeling restriction is a far cry from the casually adopted ordinance in *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977), which cut off the dissemination of information.

are commercial speech, and their use can be prohibited even without a showing of deception, without violating the First Amendment. Moreover, petitioners' argument, which they described as "the heart of the matter," J.A. 47, that because they (like USOC) are a non-profit organization, they are somehow automatically exempt from trade regulations was long ago rejected. *American Medical Ass'n* v. *United States*, 130 F.2d 233, 237 (D.C. Cir. 1942, *aff'd*, 317 U.S. 519, 528 (1943). "Recruitment and selling are commercial activities, even when conducted for training rather than for profit." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 640 (O'Connor, J., concurring).[34]

2. *Even if the Standards for Non-Commercial Speech Were Applied, the Statute's Labeling Restriction Met Constitutional Standards.*

No doubt recognizing that under the commercial speech decisions of this Court the rulings of all the courts below were clearly proper, petitioners urge—by means of repeated assertions—that their use of the "Olympic" label to promote their games and associated wares should be tested instead by the standard the First Amendment applies to purely expressive communications. But even that non-commercial First Amendment standard is not violated by the Act of Congress here.

Petitioners seek simply by invoking the First Amendment to override the legal consequences that follow when they "readily admit that they have used the combination of 'Gay Olympic Games' to promote, and to sell items . . .," J.A. 67, in violation of a limited regulation enacted for ample reasons of public policy. They have no such right. Legally protected property does not become free to the public merely because someone wishes to use it and

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[34] Even as to particular uses under the Copyright Act, "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 562 (1985).

invokes the First Amendment. *Hudgens* v. *NLRB*, 424 U.S. 507 (1976); *Lloyd Corp.* v. *Tanner*, 407 U.S. 551 (1972); see also, *e.g.*, *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 555-60 (1985); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944) (First Amendment does not prevent application of neutral prohibition to child distributing religious literature); *FTC* v. *Standard Educ. Society*, 302 U.S. 112 (1937).

Section 110 does not prevent anyone from discussing, approving or opposing the Olympic Games.[35] It simply restricts a limited form of use of the word "Olympic" as a designation or label. It is, from the viewpoint of First Amendment concerns, "content-neutral." *Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789 (1984). Hence *Police Dept.* v. *Mosley*, 408 U.S. 92 (1972), which invalidated an ordinance permitting picketing on some subjects but not others, is not pertinent here. "The State may . . . enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); see also *Regan* v. *Time, Inc.*, 468 U.S. 641, 648 (1984); *City of Renton* v. *Playtime Theatres, Inc.*, 106 S. Ct. 925 (1986); *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972). As this Court expressed the rule in *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968),

> "Whatever imprecision inheres in these terms, we think it is clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the govern-

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[35] Contrary to P. Br. 22 n.2, USOC from the beginning of this litigation clearly disavowed any suggestion that the statute could be used to restrict news reporting on the Olympic Games. J.A. 20, 53, 189.

> mental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

All those requirements are amply met here.

The statute here is perhaps most significant not for what it does, but for what it does not do. Petitioners remain free:

—To comment on the Olympic Games;

—To criticize the Olympics;

—To say that their Games are just as good as the Olympics;

—To say whatever they choose about society's attitudes towards homosexuality.[36]

In addition, they are not restricted:

—From holding quadrennial international athletic contests;

—From inviting thousands of athletes from many countries;

—From awarding medals and staging ceremonies and parades;

—From publicizing their event throughout the world;

—From raising funds.

All that they may not do is carry on these activities under the "Olympic" label. The injunction has not prevented the highly successful, J.A. 473-74, 477, 1982 Gay Games I from being repeated in 1986 on an even larger scale, with 3,400 participants from 17 countries. See p. 8, n.7, *supra*.[37]

"[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron* v. *Inter-*

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[36] *Cf. Dallas Cowboys Cheerleaders, Inc.* v. *Pussycat Cinema, Ltd.*, 604 F.2d 200, 204 (2d Cir. 1979): "There are numerous ways in which defendants may comment on 'sexuality in athletics' without infringing plaintiff's trademark."

[37] The recent "Goodwill Games" likewise were held without use of "Olympic."

national Society for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981). "For the right to communicate is not limitless," *Carey* v. *Brown*, 447 U.S. 455, 470 (1980), and even "[t]he right to associate for expressive purposes is not absolute." *Roberts* v. *United States Jaycees*, *supra*, 468 U.S. at 623. And those who wish to express views are not privileged thereby to violate otherwise applicable content-neutral regulations. *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984); *Cox* v. *New Hampshire*, 312 U.S. 569, 578 (1941). The statute most certainly does not prohibit all use of the word "Olympic" in every context, as the dissenting judge in the Court of Appeals appeared to worry it would. That clearly is not its consequence here. It is tailored to serve an important non-speech-related purpose, one far more clearly delineated than is usual. It "abridges no more speech or associational freedom than is necessary to accomplish that purpose." *Roberts* v. *United States Jaycees*, *supra*, 468 U.S. at 629. And "[t]he alternative means of communication left open are almost limitless." *Regan* v. *Time, Inc.*, *supra*, 468 U.S. at 659 n.13 (White, J.); see also *id.* at 704 (Stevens, J.).

No doubt the statute did not authorize protection used simply to silence criticism or discussion of the owner's activities or activities associated with it—to block, with no reasonable alternatives, communication of the speaker's message.[38] But that was not the case here. The

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[38] The dispositive issue in *Stop the Olympic Prison* v. *United States Olympic Committee*, 489 F. Supp. 1112 (S.D.N.Y. 1980), where the Olympic rings were used on a poster objecting to conversion of Olympic housing at Lake Placid, N.Y., into a prison, was whether the posters were substantially sold in trade. The district court found they were not. See *id.* at 1121. (Contrary to petitioners' statement, Petition for Certiorari 11, USOC was a defendant, not plaintiff, in *Stop*.) As the District Court here contrasted, "S.T.O.P. was not seeking to promote any theatrical exhibition, athletic performance, or competition by its use of the word 'Olympic' and the Olympic symbols in its poster." P.S.A. 109. Even parody cannot appropriate the substance of what is protected. See, *e.g.*, *Dallas*

present case is a far cry from those in which the contemplated use of a statutorily protected name or emblem or trademark or copyright is essential to communicate a message about it. *Cf., e.g., Schacht* v. *United States*, 398 U.S. 58 (1970) (construing 18 U.S.C. § 702 in conjunction with 10 U.S.C. § 772(f) to permit use of army uniform in theatrical production). Petitioners did not seek to discuss the Olympic Games. They did not seek to criticize the Olympic Games. What they sought to do was promote their own product, using the goodwill associated with USOC's protected name. Appropriating "Olympic" as their label was not essential to communication on any public issue.[39] Petitioners had no more First Amendment right to market the "Gay Olympics" than they would "Gay Coca-Cola," or "Gay Kodak" cameras, or "Gay Ivory Soap," or to solicit funds for the "Gay Red Cross."[40]

Cowboys Cheerleaders, Inc. v. *Pussycat Cinema, Ltd.*, 604 F.2d 200, 205 (2d Cir. 1979); *Walt Disney Productions* v. *Air Pirates*, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979).

[39] Even if the technical Lanham Act defense of "fair use in description" had been included in § 110, it could not be satified here, because petitioners sought to use "Olympic" as the identification of their own product; the defense "is not available if the alleged descriptive use is in fact a trademark use." *Beer Nuts, Inc.* v. *Clover Club Foods Co.*, 711 F.2d 934, 937 (10th Cir. 1983); Denicola, *supra* n.31, at 193.

[40] This case is unlike *Cohen* v. *California*, 403 U.S. 15 (1977), in which comment on a public issue was held constitutionally protected even though the state judged the word used "offensive," at least "absent a more particularized and compelling reason," 403 U.S. at 26. Contrary to the dissenting judge's concern, P.C.A. 34, if petitioners had merely said, "f - - - the Olympics," the statute would not have been violated and this case would not have arisen. See also *Spence* v. *Washington*, 418 U.S. 405 (1974), holding that flag desecration could not prohibited for "offensiveness," particularly because the statute there had "nearly limitless sweep." 418 U.S. at 414 n.9.

Petitioners can make no overbreadth challenge to the statute, confined as it is to specified limited uses and, in the context of an international athletic competition and associated trade goods, "unquestionably applicable" to them. *Young* v. *American Mini Thea-*

3. *Petitioners' Proposed New Constitutional Rule Would Invalidate Long Accepted Federal and State Laws.*

The constitutional rule that petitioners seek here would not only result in declaring this Act of Congress unconstitutional. It would apparently invalidate dozens of similar federal statutes that with civil or criminal sanctions prohibit the unauthorized use of particular names and trade symbols.[41] And it apparently would invalidate a

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tres, Inc., 427 U.S. 50, 59 (1976); *accord, e.g., Roberts* v. *United States Jaycees, supra*, 468 U.S. at 630-31; *Parker* v. *Levy*, 417 U.S. 733, 760 (1974). As for petitioners' apparent claim that USOC has some burden of proving damage to itself, P. Br. 35, that as this Court has recognized is not the victim's burden even in a trademark infringement case. "Congress did not put upon the despoiled the burden—as often as not impossible to sustain—of showing that but for the defendant's unlawful use of the mark, particular customers would have purchased the plaintiff's goods." *Mishawaka Rubber & Woolen Mfg. Co.* v. *S.S. Kresge Co.*, 316 U.S. 203, 206 (1942).

[41] See 36 U.S.C. § 18c (Daughters of the American Revolution); 36 U.S.C. § 27 (Boy Scouts); 36 U.S.C. § 36 (Girl Scouts); 36 U.S.C. § 48 (American Legion); 36 U.S.C. § 56f (United Spanish War Veterans); 36 U.S.C. § 67p (AMVETS); 36 U.S.C. § 78o (Ladies of the Grand Army of the Republic); 36 U.S.C. § 87 (U.S. Blind Veterans); 36 U.S.C. § 90h (Disabled American Veterans); 36 U.S.C. § 100 (American War Mothers); 36 U.S.C. § 117 (Veterans of Foreign Wars); 36 U.S.C. § 206 (Civil Air Patrol); 36 U.S.C. § 236 (Reserve Officers Association); 36 U.S.C. § 286 (Future Farmers of America); 36 U.S.C. § 316 (Military Chaplains Association); 36 U.S.C. § 418 (Conference of State Societies); 36 U.S.C. § 446 (National Conference on Citizenship); 36 U.S.C. § 477 (National Safety Council); 36 U.S.C. § 516 (Board for Fundamental Education); 36 U.S.C. § 547 (Sons of Union Veterans); 36 U.S.C. § 587 (Foundation of Federal Bar Association); 36 U.S.C. § 777 (Veterans of World War I); 36 U.S.C. § 867 (Blinded Veterans Association); 36 U.S.C. § 895 (Big Brothers-Big Sisters); 36 U.S.C. § 1017 (National Women's Relief Corps); 36 U.S.C. § 1086 (Little League Baseball); 36 U.S.C. § 1160 (Paralyzed Veterans of America); 36 U.S.C. § 1215 (U.S. Capitol Historical Society); 36 U.S.C. § 1307 (United Service Organizations); 36 U.S.C. § 2115 (American Ex-Prisoners of War); 36 U.S.C. § 2909 (Daughters of the American Colonists); 36 U.S.C. § 3015 (369th Veterans' Association); 36 U.S.C. § 3305 (American National Theater and

host of state unfair-competition statutes and common-law doctrines as well.

Among commercial trade rights under the broad rubric of unfair competition are causes of action which have been created by courts or legislatures labeled misappropriation,[42] right of publicity,[43] and protection against dilution.[44] None of these torts requires any confusion as to source. Some are set forth in terms that strikingly resemble § 110. *E.g.*, N.Y. GEN. BUS. L. § 397, p. 14a, *infra*. Further, at least 23 state legislatures,[45] including most of the commercial centers, have enacted antidilution laws to protect against "diminution of plaintiff's name as an advertising tool," [46] to prevent "a gradual whittling

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Academy); 36 U.S.C. § 3416 (American Symphony Orchestra League); 36 U.S.C. § 3615 (Pearl Harbor Survivors Association). See also 18 U.S.C. § 705 (badges or medals of veterans' organizations); 18 U.S.C. § 706 (Red Cross); 18 U.S.C. § 707 (4-H Club); 18 U.S.C. § 708 (Swiss coat of arms); 18 U.S.C. § 709 (federal agencies); 18 U.S.C. § 711 ("Smokey Bear"); 18 U.S.C. § 711a ("Woodsy Owl"); 18 U.S.C. § 715 ("Golden Eagle Insignia").

[42] *International News Service* v. *Associated Press*, 248 U.S. 215 (1918).

[43] *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

[44] *E.g.*, *Community Federal Savings & Loan Association* v. *Orondorff*, 678 F.2d 1034 (11th Cir. 1982). See generally Note, *Developments in the Law—Competitive Torts*, 77 HARV. L. REV. 888 (1964).

[45] See ALA. CODE § 8-12-17; ARK. STAT. ANN. § 70-550; CAL. BUS. & PROF. CODE § 14330; CONN. GEN. STAT. § 35-11i(c); DEL. CODE § 6-3313; FLA. STAT. § 495-151; GA. CODE ANN. § 10-1-451; IDAHO CODE § 48-512; ILL. REV. STAT. ch. 140, § 22; IOWA CODE § 548.11; LA. REV. STAT. ANN. § 51.223.1; ME. REV. STAT., tit. 10, § 1530; MASS. GEN. L. ch. 110B, § 12; MO. REV. STAT. § 417.061; MONT. CODE ANN. § 30-13-334; NEB. REV. STAT. § 87-122; N.H. REV. STAT. ANN. § 350-A:12; N.M. STAT. ANN. § 57-3-10; N.Y. GEN. BUS. L. § 368-d; OR. REV. STAT. § 647.107; 54 PA. CONS. STAT. § 1124; R.I. GEN. LAWS § 6-2-12; TENN. CODE ANN. § 47-25-512.

[46] *Wedgwood Homes, Inc.* v. *Lund*, 294 Ore. 493, 659 P.2d 377 (1983); see also *Dreyfus Fund, Inc.* v. *Royal Bank of Canada*, 525 F. Supp. 1108 (S.D.N.Y. 1981).

away"[47] of its "unique character,"[48] and to protect the selling power of a name with favorable associations[49]—for example, the "magic" name of the Masters Golf Tournament.[50]

The proper amount of protection states should grant against misappropriation has often been controversial.[51] But petitioners are in effect asking this Court to wipe out much of that policy debate and invalidate large chunks of state common law and legislation, by a proposed constitutional holding that the First Amendment forbids protecting a trade designation beyond the likelihood-of-confusion standard of the Lanham Act—converting that 1946 trade regulation into a constitutional straitjacket. Yet "courts are ill-equipped" to make judgments about the proper scope of rights under misappropriation law. *International News Service* v. *Associated Press*, *supra*, 248 U.S. at 267 (Brandeis, J., dissenting). And this Court has held in the related area of trade secrets that "States may hold diverse viewpoints in protecting intellectual property . . . . The only limitation on the States is that . . . they do not conflict with the operation of the laws in this area passed by Congress . . . ." *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470, 479 (1974).[52]

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[47] *Allied Maintenance Corp.* v. *Allied Mechanical Trades, Inc.*, 42 N.Y.2d 538, 369 N.E.2d 1162, 399 N.Y.S.2d 628 (1977).

[48] *Community Federal Savings & Loan Ass'n* v. *Orndorff*, 678 F.2d 1034, 1037 (11th Cir. 1982).

[49] *Sally Gee, Inc.* v. *Myra Hogan, Inc.*, 699 F.2d 621 (2d Cir. 1983); see also *Exxon Corp.* v. *Exxene Corp.*, 696 F.2d 544 (7th Cir. 1982).

[50] *Augusta National, Inc.* v. *Northwestern Mutual Life Ins. Co.*, 193 U.S.P.Q. 210 (S.D. Ga. 1976); see also *Instrumentalist Co* v. *Marine Corps League*, 694 F.2d 145 (7th Cir. 1982). See generally Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813 (1927).

[51] *E.g.*, Derenberg, *The Problem of Trademark Dilution and Anti-dilution Statutes*, 44 CALIF. L. REV. 439 (1956).

[52] In *Kewanee Oil*, *supra*, and *Goldstein* v. *California*, 412 U.S. 546 (1973), this Court rejected interpretations of prior decisions that

C. The Relief Granted Was Ordinary, Necessary and Appropriate.

Petitioners argue that they should not have been enjoined from using the label "Olympic," and that some sort of disclaimer appended to their promotional material would have sufficed. But the courts have held time and time again that when one entrepreneur adopts the trade name of another, a disclaimer or embellishment is not enough. See, *e.g.*, *Jacobs* v. *Beecham*, 221 U.S. 263, 272 (1911) (Holmes, J.); *Menendez* v. *Holt*, 128 U.S. 514, 521 (1888). The propriety of injunctive relief is "so clear" in such cases as seldom to warrant discussion. *Dallas Cowboys Cheerleaders, Inc., supra*, 604 F.2d at 206.

The difficulty with petitioners' argument is that they are not just marketing products and conducting competitions similar to USOC's. That they are free to do, and their right to do so is not challenged. What petitioners have attempted is to go further and appropriate USOC's label. In such cases, a disclaimer is not enough. Unlike corrective copy added to a misleading advertisement, *cf. Better Business Bureau of Metropolitan Houston, Inc.* v. *Medical Directors, Inc.*, 681 F.2d 397 (5th Cir. 1982), a disclaimer cannot keep up with a label.[83] If all that were needed were a disclaimer, the Amateur Sports Act would be effectively worthless. Anyone could circumvent it.

The cases in which petitioners attempt to find support for their disclaimer argument did not involve narrow restrictions like the present one, which allow abundant speech, and restrict only the labeling of an event and goods. Rather, those cases were instances where

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would have severely limited state misappropriation law. See *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (1964); *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964).

[83] "[T]here is no First Amendment rule . . . requiring a State to allow deceptive or misleading commercial speech whenever the publication of additional information can clarify or offset the effects of the spurious communication." *Friedman* v. *Rogers, supra*, 440 U.S. at 12 n.11.

an entire message or performance had been banned.[54] No limit at all was placed on petitioners' message here. They were even free to claim, if they wanted, that their event was just as good as or better than the Olympic Games, and they did so. J.A. 402. All that they were prevented from doing was promoting and selling under the "Olympic" label.

Section 110 does not require confusion for a violation, and a disclaimer cannot cure the violation. The relief ordered by the courts below was ordinary, was clearly contemplated by the statute, and was not an abuse of discretion.[55]

III. ENFORCEMENT AGAINST PETITIONERS OF THE LABELING PROTECTION DID NOT VIOLATE ANY CONSTITUTIONAL PROVISION.

In the face of adverse findings below, total lack of evidence on their part, and overwhelming undisputed evidence to the contrary, petitioners continue to claim as they did from the beginning that they have been "selectively prosecuted." J.A. 99. And from this unsupported premise, they urge a radical holding that USOC should be treated in its litigative decisions as if it were an agency of government.

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[54] *E.g., In re R.M.J.*, 455 U.S. 191 (1982); *Consumers Union* v. *General Signal Corp.*, 724 F.2d 1044 (2d Cir. 1983), *cert. denied*, 469 U.S. 823 (1984); *Allen* v. *National Video, Inc.*, 610 F. Supp. 612 (S.D.N.Y. 1985). In *Champion Spark Plug Co.* v. *Sanders*, 331 U.S. 125 (1947), this Court explicitly recognized that where one entrepreneur markets goods under the name of another, a disclaimer is not enough, and "equity then steps in to prohibit defendant's use of the mark. . . ." 331 U.S. at 128.

[55] *A. T. Cross Co.* v. *Jonathan Bradley Pens, Inc.*, 470 F.2d 689 (2d Cir. 1972). See also, *e.g., Boston Professional Hockey Ass'n* v. *Dallas Cap and Emblem Mfg., Inc.*, 510 F.2d 1004, 1013 (5th Cir. 1975); see generally cases and empirical data collected in Jacoby & Raskopf, *Disclaimers in Trademark Infringement Litigation: More Trouble Than They Are Worth?*, 76 TRADEMARK REP. 35 (1986); Radin, *Disclaimers as a Remedy for Trademark Infringement: Inadequacies and Alternatives*, 76 TRADEMARK REP. 59 (1986).

A. Petitioners Made No Showing Whatsoever That They Were Victims of "Selective Prosecution."

As the District Court found, P.C.A. 123-25, the record in this case is utterly barren of any evidence that USOC singled out petitioners because of who they are.[56] In fact, it affirmatively shows the opposite. J.A. 363, 366. Petitioners' discrimination claim is nothing more than assertion, as even the dissenting judge below recognized. P.C.A. 40. Petitioners had full discovery for two years in the District Court, and still could not support their easy-to-allege discrimination charge. What the record does show is that since USOC was authorized to do so six years ago, it has consistently objected to use of the label "Olympic" for athletic contests, and has consented on only three occasions—the Special, Junior, and Explorer Olympics—all of them programs conducted by USOC's own members to carry out USOC's own Amateur Sports Act obligations. J.A. 57, 60. USOC has not consented to *any* other uses, except those it licenses to raise funds. J.A. 33-34. When this suit was brought, USOC had sought to prevent use of "Olympic" for all fifteen athletic contests brought to its attention, achieving compliance in nine with the rest pending. J.A. 61. Even petitioners admitted that other violators "in many instances" had received letters of warning from USOC. J.A. 51. The great bulk of those who receive such letters simply comply, *e.g.*, J.A. 435, as petitioners initially did here, J.A. 96, 365. In other instances, both before and after petitioners' violation, including one case against 128 different violators,[57]

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[56] USOC, the record is clear with no contrary evidence, did not refuse to allow petitioners use of the "Olympic" label because of their proclaimed homosexuality. See J.A. 131, 363, P.C.A. 123-25. Even if the case were different, however, there is ample authority holding that, for example, even trademark holders may enjoin uses reasonably judged likely to affect the designation's value, even in the absence of competition or possible confusion. See, *e.g.*, *Coca-Cola Co.* v. *Gemini Rising, Inc.*, 346 F. Supp. 1183 (E.D.N.Y. 1972).

[57] *USOC* v. *Various John Does*, No. CV 84-5515-RG (C.D. Cal. 1985); see pp. 37a-42a, *infra*.

USOC has gone to court.[58]

USOC's decisions on when to litigate are not unreasonable.[59] There are essentially five categories of uses of "Olympic" that are likely to occur:

1. To designate a major public exhibition of athletic contests.
2. For events—often one-time and usually local—which are not serious athletic contests, but rather are essentially shows. Examples are the "Crab-Cooking Olympics" or "Dog Olympics" referred to at P. Br. 8.
3. For trade goods, such as T-shirts, souvenirs, and the like.

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[58] Since the Amateur Sports Act was enacted, USOC has litigated to prevent use of "Olympic" or Olympic symbols in the following additional cases, most of them terminating with consent decrees: *National Amateur Sports Foundation* v. *USOC*, No. CA 80-496 (D.D.C. 1980), J.A. 392; *USOC* v. *Adelman Enterprises*, No. CV 83-2697 (C.D. Cal. 1983), J.A. 439; *USOC* v. *Colonial Coins, Inc.*, No. CA H-86-2912 (S.D. Tex. 1986); *USOC* v. *David Shoe Co.*, No. C-1-82-596 (S.D. Ohio 1982), J.A. 395; *USOC* v. *Intelicense Corp.*, 737 F.2d 263 (2d Cir. 1984), *cert. denied*, 469 U.S. 982 (1984); *USOC* v. *International Federation of Body Builders*, 219 U.S.P.Q. 353 (D.D.C. 1982), J.A. 443; *USOC* v. *March of Dimes Birth Defects Foundation*, No. CA 83-539 (D. Colo. 1983); J.A. 437; *USOC* v. *Mervyn's Inc.*, No. CV 83-6700 (C.D. Cal. 1983); *USOC* v. *Morse Shoe Co.*, No. CA 84-1012 (E.D. Va. 1984); *USOC* v. *Olympic Trails Bus Co.*, No. CA 80-2062 (D.C. Cir. 1980); J.A. 388; *USOC* v. *Romy's Ltd.*, No. CA 86-257 (D. Vt. 1986); *USOC* v. *The Roadshow, Inc.*, No. CV 84-4508 (C.D. Cal. 1984); *USOC* v. *Union Sport Apparel*, 220 U.S.P.Q. 526 (E.D. Va., 1983); *USOC* v. *Uniroyal, Inc.*, No. CA 83-0500-A (E.D. Va. 1983); *LaBranche* v. *USOC*, No. CV 85-481, (C.D. Cal. 1985). In addition, as of 1982 USOC had brought 22 oppositions to trademark applications by others, and one petition to cancel. J.A. 61. See, *e.g.*, *USOC* v. *Golden Age Olympics, Inc.*, Opp. No. 62,426, J.A. 383; *USOC* v. *Wilson Dist. Co.*, Opp. No. 70,684, p. 5a, *infra*. It has brought others since then.

[59] Respondents are aware of no rule, in trademark doctrine or elsewhere, that would require suing every violator. See *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 447 n.28 (1984); *United States Jaycees* v. *San Francisco Junior Chamber of Commerce*, 354 F. Supp. 61, 73 (N.D. Cal. 1972), *aff'd*, 513 F.2d 1226 (9th Cir. 1975).

4. In the name of some local retail business unconnected with athletic activities.

5. To solicit public donations.

USOC has been most concerned with activities in the first, third, and fifth categories, because they are the uses most likely to affect the value of the term "Olympic." Petitioners' use of "Olympic" falls squarely into those categories. Petitioners, in fact, have attempted to use the "Olympic" label for an event that more closely and consciously duplicates the modern Olympic Games, on a far grander scale, than any other violation of the statute of which USOC is aware. They are also the first who failed to comply and then trumpeted their defiance. J.A. 423, 427, 459-60.[60]

To litigate against every unauthorized use anywhere of "Olympic" in athletics or trade would be a very expensive undertaking which USOC could not afford. Not even the U.S. government tries to prosecute all violations of law. (In fact, it failed adequately to prosecute violations of the 1950 statute, which was why § 110 was passed.) USOC raises funds for athletics, not to pay for litigation. And understandably, USOC has been concerned by new unauthorized uses of "Olympic," like petitioners', more than ones, some of them "grandfathered," that have been in existence for many years prior to 1978.[61]

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[60] USOC has no vendetta against petitioners or anyone else. In fact, when petitioners at first agreed voluntarily to drop the word "Olympic," J.A. 34, 96, 365, USOC's executive director thanked them and wished them success in their event. J.A. 366; see *id.* 265. The District Court's finding that there was no "sinister cast" is entitled to respect on appellate review. *Inwood Labs., Inc.*, v. *Ives Labs.*, 456 U.S. 844, 858 (1982).

[61] The "California Police Olympics" to which petitioners devote so much space in their brief were asked by USOC to cease using the "Olympic" name, J.A. 33, as petitioners acknowledge. J.A. 97. Petitioners' tortured attempt, P. Br. 9, to read a vague letter from Switzerland at J.A. 250 as saying anything different is ridiculous. As petitioners also recognize, J.A. 100, that California activity was held for many years prior to the 1978 Act. USOC has not brought suit while the present case is pending.

In *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973), a claim was made that broadcast licensees were like government actors and violated the First Amendment when they refused to sell television time for political broadcasts. But this Court concluded that no First Amendment violation had occurred no matter how one characterized the licensees, and so "the governmental action issue does not affect the outcome of this case." 412 U.S. at 148 (Blackmun, J.); see also *id.* at 115 (Burger, C.J.); *id.* at 147 (White, J.). The present case can be treated in the same way. USOC's enforcement of the term "Olympic," as the record demonstrates, has not been arbitrary, irrational, invidious, or in any other respect differently motivated than, say, honest public officials deciding which prosecutions to bring. Petitioners' unsupported "selective prosecution" claim would fail even against government officials. No more is required of USOC.

B. USOC's Seeking To Enforce Protection Against Unauthorized Uses of Its Protected Designation Is Not Governmental Action.

The various "state action" theories urged by petitioners and their *amici* are no doubt familiar to this Court. They are all falsely premised on USOC having pursued an enforcement policy that a government could not have. They simply do not apply here.

1. *The Doctrine of* Shelley v. Kraemer *Does Not Apply.*

There is no occasion here for this Court to revisit the intellectually troubling[62] and very limited doctrine of *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). Obviously, whenever a court, as here, rejects a litigant's First Amendment defense and issues an injunction, a constitutional decision has been rendered and the First Amendment

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[62] See, *e.g.*, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29-31 (1959); H. FRIENDLY, THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA 14-18 (1971).

ruling can be reviewed. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 265 (1964). That is what much of this brief has been about.

Petitioners appear beyond that to be urging a very different proposition, resting not on the First Amendment but on equal-protection guarantees of the Fifth[63] and Fourteenth.[64] They argue that even if the *remedy* granted here did not violate the Constitution, the *decision to sue* them did. They would have it that when a litigant goes to court, the motivations for doing so can become an issue to be judicially tested as if the litigant were a government agency. But *Shelley* has never been expanded in that way—indeed, it has never been extended by this Court beyond the peculiar situation of racially restrictive covenants.[65] *Shelley*, moreover, involved only an interpretation of the Fourteenth Amendment of 1868, not, as here, of the First and Fifth Amendments of 1791. To import the peculiar Fourteenth Amendment state-racial-discrimination doctrine of *Shelley* into this case would ig-

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[63] The Fifth Amendment has not been brought under *Shelley*. *Shelley's* federal companion, *Hurd* v. *Hodge*, 334 U.S. 24 (1948), rested not on the Fifth Amendment or governmental action but rather on violation of a federal statute. 334 U.S. at 30.

[64] Constitutional limitations have been applied even more readily when there was an infringement of the Fifteenth Amendment's ban on racial denial of the franchise. It is no coincidence that *amici* rely so heavily on the two farthest-reaching Fifteenth Amendment cases, which themselves went well beyond any Fourteenth Amendment decisions. *Terry* v. *Adams*, 345 U.S. 461 (1953); *Smith* v. *Allwright*, 321 U.S. 649 (1944). Petitioners as a group, moreover, although they enjoy First Amendment rights to speak and associate, are not a specially protected minority in the sense of, *e.g.*, the Fourteenth Amendment's equal-protection guarantee as read into the Fifth. "Bluntly, blackness and homosexuality are not the same phenomenon." *Boy Scouts* v. *Teal*, 374 F. Supp. 1276, 1281 (E.D. Pa. 1974) (Higginbotham, J.).

[65] Even in this Court's last case before Title II of the 1964 Civil Rights Act, 78 Stat. 243 (1964), 42 U.S.C. § 2000a, mooted the issue whether the Fourteenth Amendment directly banned enforcement of trespass laws to enforce racial segregation, only one of the three Justices who concluded that it did relied to any significant

nore its uniqueness and its extremely limited application over the past four decades of this Court's jurisprudence, and would set constitutional limits on private behavior with no logical limits.

2. *USOC Is Not a Governmental Body.*

Petitioners' other Fourteenth-Amendment-type theories for converting USOC into a government agency are also far-fetched, and at best irrelevant on this record.

Every court to consider the matter has ruled that USOC is not directly subject to the constitutional restrictions applied to governments. *DeFrantz* v. *United States Olympic Committee*, 701 F.2d 221 (D.C. Cir. 1980), *affirming mem.* 492 F. Supp. 1181 (D.D.C. 1980), rejected First,[66] Fifth and Ninth Amendment challenges to USOC's debated decision to respond to governmental urging to boycott the 1980 Olympic Games. Another court likewise found that "the USOC is a self governing body, operating independently of public control." *Burton* v. *United States Olympic Committee*, 574 F. Supp. 517, 524 (C.D. Cal. 1983); *accord*, *Gault* v. *International Olympic Committee* (C.D. Cal. 1984), p. 16a, *infra*; *cf. Stearns* v. *Veterans of Foreign Wars*, 394 F. Supp. 138, 144 (D.D.C. 1975), *aff'd mem.*, 527 F.2d 1387, *cert. denied*, 429 U.S. 822 (1976).[67]

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extent on *Shelley*. *Bell* v. *Maryland*, 378 U.S. 226, 255-59 (1964) (Douglas, J., concurring). Three Justices limited *Shelley* as based upon a violation of federal civil rights legislation and interference with the property rights of a willing buyer and a willing seller. See 378 U.S. at 328-33 (Black, J., joined by Harlan and White, JJ., dissenting).

[66] Petitioners say that the presence of a First Amendment claim distinguishes the present case from *DeFrantz*, P. Br. 29, yet the First Amendment was exactly what the plaintiffs in *DeFrantz* invoked. See 492 F. Supp. at 1185, 1192.

[67] In *Martin* v. *International Olympic Committee*, 740 F.2d 670 (9th Cir. 1984), a suit to require additional events for women in the 1984 Olympics, the Ninth Circuit without additional explanation said in dictum that "we cannot say, on this record, that the district court erroneously found state action present;" but the "state ac-

USOC is not "a state-created organization," nor "an agent of the federal government." A. Br. I 50, 8. USOC "is an independent body, and nothing in its chartering statute gives the federal government the right to control . . . ." *DeFrantz* v. *USOC*, *supra*, 492 F.Supp. at 1194.[68] It is defined by statute as a "private corporation established under Federal law." 36 U.S.C. § 1101(46). The House Report on the Amateur Sports Act emphasized that USOC "is not a U.S. entity." H.R. Rep. No. 95-1627, 95th Cong., 2d Sess. 6 (1978). The IOC would not allow it to be.[69]

USOC is and always has been privately supported. The only occasion on which USOC received any appropriation from the federal government was in 1980, when Congress made a one-time grant of $10 million to help USOC recover some of the losses it incurred by boycotting the 1980 Olympic Games in Moscow; that was most analogous to a private bill for a particular injury, and was characterized by Congress as "a form of disaster

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tion" was with respect not to USOC, but to the Los Angeles Olympic Organizing Committee, which in the circumstances a district court dictum concluded was an arm of the City of Los Angeles. See *Martin* v. *International Olympic Committee*, No. CV 83-5847 Kn (C.D. Cal. Apr. 16, 1984), slip op. at 19.

[68] By contrast, *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), a Fourteenth Amendment authority on which petitioners principally rely, involved a publicly funded and publicly maintained building. *Burton* like *Shelley* v. *Kraemer*, *supra*, has not given rise to subsequent decisions of this Court, with the possible exception of *Evans* v. *Newton*, 382 U.S. 296 (1966), and to some extent reflects the imperatives of its time. *Cf.* H. FRIENDLY, *supra*, at 41 n.140.

[69] IOC Rule 24C, p. 23a, *infra*, provides:

> "NOCs must be autonomous and must resist all pressures of any kind whatsoever, whether of a political, religious or economic nature. In pursuing their objectives, NOCs may cooperate with private or government organizations. However, they must never associate themselves with any undertaking which would be in conflict with the principles of the Olympic Movement and with the Rules of the IOC."

payment."[70] In any event, government subsidy would not of itself make an activity governmental action. *Polk County* v. *Dodson*, 454 U.S. 312 (1981). Otherwise, for example, nearly every farmer in the United States would be a government official. See, *e.g.*, *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982).[71]

Some of the confusion in petitioners' submissions stems from the fact that the Amateur Sports Act of 1978 is first and foremost a corporate charter. See 92 Stat. 3045, § 1, as amended, 36 U.S.C. § 371. Federal charters of private corporations, like state-granted corporate charters, describe the purposes, usually in broad terms. "The objects for which a corporation is created are universally such as the government wishes to promote." *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 637 (1819). Here they include various aspects of promoting amateur athletics, as well as all the standard corporate powers such as to make contracts, own property, borrow money, sue and be sued, and the duty to

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[70] See S.Rep. No. 96-829, 96th Cong., 2d Sess. 241 (1980); Act of July 8, 1980, 94 Stat. 857, 898. "Private contributions to the USOC have declined dramatically since the January action by the Congress and the President's announcement of our intent to boycott the Moscow games." Hearings Before Subcommittee of Senate Appropriations Committee, May 14, 1980 (unpub.) (testimony of Under Secretary of Commerce Herzstein). Of the $10 million, $6 million was a matching grant conditioned on equal private donations. In 1978 $16 million for USOC had been authorized, Jt. Res. of Oct. 18, 1978, § 113(a), 92 Stat. 1603, 1605, but not appropriated. A $30 million payment proposed in the House committee version of the Amateur Sports Act was never enacted. See H.R. Rep. No. 95-1627, 95th Cong., 2d Sess. 18 (1978).

Congress in the Olympic Commemorative Coin Act, Act of July 22, 1982, 96 Stat. 222, authorized the one-time issuance of commemorative coins displaying respondents' designations honoring the 1984 summer Olympic Games, with a portion of the profits from sales to collectors to go to USOC; the act specifically required that there be "no net cost to the United States Government." *Id.*, § 10(a).

[71] See also *Blum* v. *Yaretsky*, 457 U.S. 991 (1982); *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149 (1978).

file annual reports. See 92 Stat. 3046-47, 3049-50, § 1, as amended, 36 U.S.C. §§ 374, 375, 382a, 391.[72]

A corporate charter certainly does not *ipso facto* create an arm of the government, unless all the organizations in Title 36 of the United States Code, and all the national banks (which unlike USOC in addition are heavily regulated), and presumably all state-incorporated companies, are also.[73] Nor are organizations which are chartered to perform good works automatically state entities. Nor did Congress by imposing some duties make USOC governmental. Congress chose in a small way to regulate amateur sports, as it more extensively does businesses, air purity, securities traders and automobiles. It did not choose to nationalize them.

USOC does not exercise any monopoly over amateur athletics in the United States, see, *e.g.*, Amateur Athletic Act § 206, 36 U.S.C. § 396 (and even if it did, would not thereby become a government agency, *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974)). That would be a gargantuan task, indeed, even if one accepted petitioners' improbable assertion that it should be regarded as a "governmental function," albeit one "that was not performed by anyone." A. Br. I 50. USOC's activities are much more modest. They are set forth in § 104 of

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[72] For example, the federal charter's recognition that USOC has "exclusive jurisdiction . . . over all matters pertaining to participation of the United States in the Olympic Games," § 104(3), 36 U.S.C. § 374(3), merely parallels the authority USOC has under the IOC charter. See IOC Charter § 24, pp. 22a-23a, *infra*.

[73] "From the fact, then, that a charter of incorporation has been granted, nothing can be inferred which changes the character of the institution. . . ." *Trustees of Dartmouth College* v. *Woodward*, *supra*, 4 Wheat. at 638. "In writing this legislation, Congress did not create a new relationship between the USOC and the IOC. Rather, it recognized an already long-existing relationship between the two and statutorily legitimized that relationship with a federal charter and federal incorporation." *DeFrantz* v. *United States Olympic Committee*, 492 F. Supp. 1181, 1187 (D.D.C.), *aff'd mem.*, 701 F.2d 221 (D.C. Cir. 1980) (footnote omitted); 124 CONG. REC. S7095-96, H10745, H12285 (1978).

its charter, 36 U.S.C. § 374. It supervises the selection of athletes from the United States for the Pan American and Olympic Games, it acts as a liaison with the International Olympic Committee, and it organizes the Olympic Games when they are held in the United States. It is difficult to understand how USOC could be subjected to petitioners' "state action" theory without sweeping in a host of other private groups.[74]

Petitioners' *amici* argue that without petitioners' expanded governmental-action doctrine, "USOC *could* discriminate on the basis of race, religion or ethnic background (as well as on the basis of sexual orientation or the content of expression)", and that "There *would be nothing to prevent* USOC from licensing only white supremacist organizations." A. Br. I 10. But nothing in the record shows USOC has actually done any of those things or proposes to do them. Petitioners' position is reduced to "what-ifs" because the record is totally devoid of any support for the assertion that USOC has any malevolent intent. Moreover, Congress and the states have found better ways to protect minority rights than by contorting constitutional doctrine. USOC like other persons in this country is subject to a wide variety of civil rights laws. *Cf. Roberts* v. *United States Jaycees, supra.* California's Unruh law, for example, prohibits discrimination against homosexuals.[75] And Congress in the charter

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[74] *Cf., e.g., Jackson* v. *American Bar Ass'n*, 538 F.2d 829 (9th Cir. 1976); *New York City Jaycees, Inc.* v. *United States Jaycees, Inc.*, 512 F.2d 856 (2d Cir. 1975); *Stearns* v. *Veterans of Foreign Wars, supra.* USOC conducts many activities much more controversial than objecting to unauthorized uses of "Olympic." "[T]here can be few less suitable bodies than the federal courts for determining the eligibility or the procedures for determining the eligibility, of athletes to participate in the Olympic Games." *Michels* v. *United States Olympic Committee*, 741 F.2d 155, 159 (7th Cir. 1984) (concurring opinion); see also *Oldfield* v. *Athletic Congress*, 779 F.2d 505 (9th Cir. 1985).

[75] CAL. CIV. CODE § 51. *See Curran* v. *Mount Diablo Council*, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983), *appeal dismissed*, 468 U.S. 1205 (1984); *Hubert* v. *Williams*, 183 Cal. App. 3d Supp. 1, 184 Cal. Rptr. 161 (Cal. Super. 1982).

itself has required USOC to obey special antidiscrimination requirements. See §§ 104(12), (13), (14), § 201(b)(6)(7), 36 U.S.C. §§ 374(12), (13), (14), § 391(b)(6), (7). The imagined discriminatory policies to which petitioners' case is reduced thus are not just hypotheticals; they approach legal impossibilities.[76]

CONCLUSION

For the reasons stated, the judgment should be affirmed.

Respectfully submitted,

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January 5, 1987

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[76] "The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined." *United States* v. *Raines*, 362 U.S. 17, 22 (1960).

ADDENDA

ADDENDUM A

The Amateur Sports Act of 1978, § 110, 92 Stat. 3045, 3048, 36 U.S.C. § 380, provides:

Use of Olympic symbols, emblems, trademarks and names

(a) Without the consent of the Corporation, any person who uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition—

(1) the symbol of the International Olympic Committee, consisting of 5 interlocking rings;

(2) the emblem of the Corporation, consisting of an escutcheon having a blue chief and vertically extending red and white bars on the base with 5 interlocking rings displayed on the chief;

(3) any trademark, trade name, sign, symbol, or insignia falsely representing association with, or authorization by, the International Olympic Committee or the Corporation; or

(4) the words "Olympic", "Olympiad", "Citius Altius Fortius", or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity;

shall be subject to suit in a civil action by the Corporation for the remedies provided in the Act of July 5, 1946 (60 Stat. 427; popularly known as the Trademark Act of 1946). However, any person who actually used the emblem in subsection (a)(2), or the words, or any combination thereof, in subsection (a)(4), for any lawful purpose prior to September 21, 1950, shall not be prohibited by this section from continuing such lawful use for the same purpose and for the same goods or services. In addition, any person who actually used, or whose assignor actually used, any other trademark, trade name,

sign, symbol, or insignia described in subsections (a)(3) and (4) for any lawful purpose prior to enactment of this Act shall not be prohibited by this section from continuing such lawful use for the same purpose and for the same goods or services.

(b) The Corporation may authorize contributors and suppliers of goods or services to use the trade name of the Corporation as well as any trademark, symbol, insignia, or emblem of the International Olympic Committee or of the Corporation in advertising that the contributions, goods, or services were donated, supplied, or furnished to or for the use of, approved, selected, or used by the Corporation or United States Olympic or Pan-American team or team members.

(c) The Corporation shall have exclusive right to use the name "United States Olympic Committee"; the symbol described in subsection (a)(1); the emblem described in subsection (a)(2); and the words "Olympic", "Olympiad", "Citius Altius Fortius" or any combination thereof subject to the preexisting rights described in subsection (a).

ADDENDUM B

The Act To Incorporate the United States Olympic Association Act of September 21, 1950, ch. 973, § 9, 64 Stat. 899, 901, provided:

> "That from and after the passage of this Act, it shall be unlawful for any person within the jurisdiction of the United States to falsely or fraudulently hold himself out as or represent or pretend himself to be a member of or an agent for the United States Olympic Association or its subordinate organizations for the purpose of soliciting, collecting, or receiving money or material; or for any person to wear or display the insignia thereof for the fraudulent purpose of inducing the belief that he is at such time a member of or an agent for the United States Olympic Association or its subordinate organizations. It shall be unlawful for any person, corporation, or association, other than the United States Olympic Association or its subordinate organizations and its duly authorized employees and agents for the purpose of trade, theatrical exhibition, athletic performance, and competition or as an advertisement to induce the sale of any article whatsoever or attendance at any theatrical exhibition, athletic performance, and competition or for any business or charitable purpose to use within the territory of the United States of America and its exterior possessions, the emblems of the United States Olympic Association consisting of an escutcheon having a blue chief and vertically extending alternate red and white bars on the base with five interlocked rings displayed on the chief, or any other sign or insignia made or colored in imitation thereof, or the words "Olympic", "Olympiad", or "Citius Altius Fortius" or any combination of these words: *Provided, however,* That any person, corporation, or association that actually used, or whose assignor actually used, the said emblem, sign, insignia, or words for any lawful pur-

pose prior to the effective date of this Act, shall not be deemed forbidden by this Act to continue the use thereof for the same purpose and for the same class or classes of goods to which said emblem, sign, insignia, or words had been used lawfully prior thereto. If any person violates the provision of this section he shall be deemed guilty of a misdemeanor, and upon conviction in any Federal court shall be liable to fine of not less than $100 or more than $500 or imprisonment for a term not exceeding 1 year, or both, for each and every offense."

The Act To Change the Name of the United States Olympic Association, Act of August 10, 1964, 78 Stat. 383, provided:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the corporation known as the United States Olympic Association, which was incorporated by the Act entitled "An Act to incorporate the United States Olympic Association," approved September 21, 1950 (64 Stat. 899), shall be known and designated hereafter as the United States Olympic Committee and any reference to such corporation under the name of the United States Olympic Association shall be held in refer to such corporation under and by the name of the United States Olympic Committee."

ADDENDUM C

[SEAL]

U.S. DEPARTMENT OF COMMERCE
Patent and Trademark Office

Address: COMMISSIONER OF PATENTS AND TRADEMARKS
Washington, D.C. 20231

Opposition No. 70,684

UNITED STATES OLYMPIC COMMITTEE

v.

WILSON DISTRIBUTING CO., INC.

MAILED
MAY 05 1986
PAT. & T.M. OFFICE

An application has been filed by Wilson Distributing Co., Inc. to register the mark "OLYMPIC" for janitorial cleaning and finishing preparations,[1] use since March 3, 1983 being asserted.

Registration has been opposed by the United States Olympic Committee essentially on the grounds that by virtue of 36 U.S.C. § 380, opposer is entitled to use and authorize use, as well as prevent registration, of "OLYMPIC" for any goods; that under the provisions of that section, applicant is precluded from registering the mark "OLYMPIC", which cannot be lawfully used in commerce without the consent of opposer; that opposer has not consented to or authorized applicant's use and registration of the mark "OLYMPIC"; that applicant's first use of the mark for the goods reicted in its application occurred in 1983; that the mark "OLYMPIC" cannot serve to exclusively identify applicant's goods, and appli-

[1] Serial No. 457,932, filed December 20, 1983.

cant cannot be the owner of the mark, where opposer possesses a superior lawful and exclusive right to authorize the use of "OLYMPIC" for the same goods; and that applicant's use of the mark "OLYMPIC" creates the mistaken impression that applicant's goods are promoted, authorized, sponsored, endorsed or associated with opposer or an Olympic-related activity in violation of 36 U.S.C. § 380 and 15 U.S.C. § 1052(d).

Applicant, in its answer to the notice of opposition, has admitted that its first known use of its mark was in 1983 and that opposer has not consented to or authorized applicant's use and registration of the mark "OLYMPIC." However, applicant takes the position that 36 U.S.C. § 380 prohibits use of "OLYMPIC" only when such use tends to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with opposer or any Olympic activity. Moreover, applicant has specifically denied that such prohibition includes the goods recited in its application; that such statute precludes applicant from registering the mark "OLYMPIC"; and that the consent of opposer is necessary for applicant's use to be lawful. Applicant has also denied the remainder of the salient allegations contained in the notice of opposition.

This case now comes up on opposer's motion for summary judgment filed August 22, 1985. As grounds therefor, opposer asserts essentially that there are no genuine issues of material fact and that opposer is entitled to judgment as a matter of law. In support of its motion for summary judgment, opposer cites, inter alia, applicant's admissions that opposer has not consented to applicant's use and registration of the mark "OLYMPIC," and that applicant claims no use of "OLYMPIC" before 1983. Opposer also relies on Section 380(c) of the Amateur Sports Act, 36 U.S.C. § 380(c), which provides, with respect to opposer, that:

> (c) The corporation shall have exclusive right to use the name "United States Olympic Committee";

> the symbol described in subsection (a)(2) of this section; and the words "Olympic," "Olympiad," "Citrus Altius Fortius" or any combination thereof subject to the preexisting rights described in subsection (a) of this section.

Applicant's brief in opposition to the motion for summary judgment reads, in full, as follows:

> Applicant opposes the Motion for Summary Judgment filed by Opposer. There has been *no* actual confusion; Opposer has not established *any* likelihood of confusion; and, moreover, Opposer's laches prevent Opposer from prevailing. In short, there are several factual issues in this case which preclude the granting of a Motion for Summary Judgment.

We believe that opposer's motion for summary judgment is well taken as a matter of law. While "likelihood of confusion" is the standard to be applied in oppositions based upon Section 2(d) of the Trademark Act of 1946, 15 U.S.C. 1052(d), no such standard is laid down in 36 U.S.C. § 380(c), which simply provides, in part, that opposer shall have the *exclusive right* to use the word "Olympic," subject to any preexisting rights described in subsection (a) of the section. There is no question here of applicant having such preexisting rights, because applicant claims use only since 1983, a date long after the enactment of this statutory provision. Thus, under 36 U.S.C. § 380(c), opposer has the exclusive right to use the word "Olympic." Inasmuch as opposer's exclusive right to use "Olympic" is unconditional, applicant, as a matter of law, cannot be the owner of the mark "OLYMPIC", nor can it lawfully use such mark in commerce without opposer's consent. See: U.S. Olympic Committee v. Olymp-Herrenwaschefabriken Bezner, 224 USPQ 497 (TTAB 1984) [wherein the Board specifically recognized that Section 380(c) of the Amateur Sports Act vests in opposer the exclusive rights in, inter alia, "Olympic", and hence would serve as an adequate ground of opposition if some party, in contra-

vention of opposer's statutory rights, attempted to register that designation].

Applicant's claim, in its brief in opposition to the motion for summary judgment, that opposer is prevented from prevailing herein by laches, is not well taken. First, laches is an affirmative defense which must be pleaded in order to be considered. See: Taffy's of Cleveland, Inc. v. Taffy's, Inc., 189 USPQ 155 (TTAB 1975), and cases cited therein. In the present case, applicant's answer to the notice of opposition contains no pleading of laches. Second, when a motion for summary judgment is made and supported as provided in Rule 56 of the Federal Rules of Civil Procedure, an adverse party may not rest upon mere allegations or denials, but rather must, by affidavit or as otherwise provided in Rule 56 (e) set forth specific facts showing that there is a genuine issue for trial. See: Pure Gold Inc. v. Syntex (U.S.A.), Inc., 739 F.2d 624, 222 USPQ 741 (CAFC 1984), aff'g 221 USPQ 151 (TTAB 1983), and Johnson & Johnson v. Bebe International, Inc., 175 USPQ 382 (TTAB 1982). Applicant here has made no such showing. Finally, it has been held that the Lanham Act defenses are not available to a defendant in a proceeding based upon the Amateur Sports Act. See: International Olympic Committee v. San Francisco Arts and Athletics, —— F.2d ——, 228 USPQ 585, 587 (CA 9 1986).

For the foregoing reasons, we conclude that there are no genuine issues of material fact as to the questions of whether applicant is the owner of the mark "OLYMPIC" for janitorial cleaning and finishing services, and whether applicant's use of the mark for such goods has been lawful; and that opposer is entitled to summary judgment on these issues as a matter of law.[2]

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[2] It is also clear that there is no genuine issue of material fact as to opposer's standing to bring this proceeding, and that opposer has such standing as a matter of law. See: U.S. Olympic Committee v. Olymp-Herrenwaschefabriken Bezner, supra, at page 500.

Accordingly, opposer's motion for summary judgment is granted, the opposition is sustained, and registration to applicant is refused.[3]

/s/ J. E. Rice
J. E. RICE

/s/ L. E. Rooney
L. E. ROONEY

/s/ G. D. Krugman
G. D. KRUGMAN
Members, Trademark Trial and Appeal Board

[3] In view of the granting of the motion for summary judgment, opposer's motion to compel, filed September 6, 1985, is moot.

ADDENDUM D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

No. 83-44

INTERNATIONAL SPORTS MARKETING, INC.

v.

INTERNATIONAL OLYMPIC COMMITTEE and
UNITED STATES OLYMPIC COMMITTEE

No. 82-278

UNITED STATES OLYMPIC COMMITTEE

v.

MILLSPORT, INC., et al.

ORDER

Intelicense by letter of June 19, 1984 to the court in response to the clerk's letter of June 11, 1984 has indicated that a hearing would adduce evidence that use of the International Olympic Committee name with no particular emphasis on the word "Olympic" in connection with the pictograms without the rings "would not tend to cause confusion, mistake or deception . . . a question

of fact . . . subject to evidentiary findings." International Sports Marketing, Inc., (ISM) by letter brief of June 25, 1984, while taking no formal position on the necessity of a hearing, argues that 36 U.S.C. § 380(a)(4) permits the use of the word "Olympic" in the name of the International Olympic Committee, as indicated by the "Grandfather" provisions of Section 380(a) and (c), at least if "strictly limited to unexaggerated lettering of standard size print for descriptive purposes only and not visually appearing in proximity with the pictogram so as to create any logos containing the word 'Olympic.'"

Reading of the opinion of the court of appeals, *United States Olympic Committee v. Intelicense Corp., S.A.*, Nos. 83-9025, 83-9063 (2d Cir. June 18, 1984), slip op. 4521-32 and especially 4529, convinces this court, however, that holding a hearing would be futile. This is true since, to sustain an injunction under 36 U.S.C. § 380(4) as to the use of the word "Olympic," no showing of a tendency to cause confusion, mistake or deception is necessary; it is only a "combination or simulation" which must have such a tendency. As to use of the International Olympic Committee name under § 380(a)(3) or (4), while the ISM argument has some appeal in the abstract, the opinion of the court of appeals, as well as the prior findings of this court, makes it clear that the I.O.C.'s authorization to utilize the official pictograms of the I.O.C. or to refer to the I.O.C. in connection therewith was conditioned in fact and by law (36 U.S.C. § 380) on Intelicense's obtaining the consent of the United States Olympic Committee, consent which has not been obtained.

Therefore, no hearing being necessary, the judgment and injunction previously entered are hereby modified to read as follows:

(a) Defendants Intelicense Corporation S.A. and International Sports Marketing, Inc., including their respective successors or assigns, officers,

representatives, agents, servants, employees, and any related company as defined in 15 U.S.C. § 1127, shall be and are hereby permanently enjoined from using or causing to be used in any manner without the consent of the United States Olympic Committee for the purpose or trade or to induce the sale of any goods or services in the United States:

(1) the Olympic symbol or any emblem containing five interlocking rings or any colorable imitation or simulation thereof, including colored rectangular panels or parallelograms;

(2) the word "Olympic" or any colorable imitation or simulation thereof, whether or not in conjunction with the words "International" and "Committee;"

(3) the representations "Official International Olympic Committee Pictograms," "Official Olympic Pictogram," "Official IOC-Pictograms," "Official IOC Summer Olympic Pictograms," or variations thereof,

(4) any trademark, trade name, sign, symbol, or insignia falsely representing association with, or authorization by the United States Olympic Committee.

(b) Defendants shall immediately serve a copy of this Amended Judgment, as well as the entire decision rendered by the Court of Appeals for the Second Circuit on June 18, 1984 in connection with Docket Nos. 83-9025 and 83-9063 upon their respective officers, agents, employees, and related companies as that term is defined in 15 U.S.C. § 1127, as well as prospective licensees, and shall file with the court within thirty days as well as serve upon the United

States Olympic Committee a certified statement listing all persons so notified.

Judgment is entered pursuant to Rule 54(b), Federal Rules of Civil Procedure.

/s/ James L. Oakes,
JAMES L. OAKES,
Sitting as a District Judge.
U.S. Circuit Judge

ADDENDUM E

New York General Business Law § 397 (1984) provides:

Unlawful use of name or other identification of certain non-profit organizations

1. No person, firm, association or corporation shall use, for advertising purposes or for purposes of trade, the name, symbol, device or other identification of any non-profit corporation, association, society or organization organized exclusively for religious, benevolent, humane, charitable, educational, hospital, patriotic, fraternal or veterans purposes or to promote the study or the advancement of the arts or sciences or to sustain, encourage or promote the musical or performing arts, without having first obtained the written consent of such non-profi corporation, association, society or organization. Any violation of this section shall be a misdemeanor.

2. Subdivision one of this act shall not apply to the use by any person, firm, association or corporation of any trade mark, trade name or other trade identification which was adopted and regularly used by such person, firm, association or corporation, prior to the enactment of this act if the use of such trade mark, trade name, or other trade identification was and is otherwise lawful but for the provisions of subdivision one of this act. Nothing contained in this act shall be construed so as to prohibit the use of any name, symbol, device or other identification when used solely for purposes of historical reference or description of geographical location only and not as a trade mark or trade name or for purposes of trade identification.

3. Whenever there shall be an actual or threatened violation of subdivision one of this section, the corporation, association, society or organization affected thereby may maintain an equitable action in the supreme court of this state to prevent and restrain said actual or threatened violation; and may also sue and recover damages

for any injuries sustained by reason of any such violation, and if the defendant shall have knowingly violated subdivision one of this section, the jury, in its discretion may award exemplary damages.

4. Nothing contained in this act shall deprive any corporation, association, society or organization entitled to invoke the remedies provided by this act of any rights or remedies existing at common law or under the penal law or any other law of this state.

ADDENDUM F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV-84-2353-CBM

WILLIE JAMES GAULT,
Plaintiff,

v.

INTERNATIONAL OLYMPIC COMMITTEE, et al.,
Defendants.

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

Plaintiff's Motion for Preliminary Injunction is DENIED. The Court finds that plaintiff has failed to exhaust his administrative remedies, which are provided in the Amateur Sports Act of 1978, 36 U.S.C. §§ 371 *et seq.* by failing to arbitrate this matter before the American Arbitration Association.

The Court also finds that while plaintiff may suffer irreparable injury, he has not demonstrated that there is a substantial probability that he will succeed on the merits. The Amateur Sports Act appears to grant authority to the United States Olympic Committee to establish National Governing Bodies (NGB's), such as The Athletic Congress, which are to "conduct amateur athletic competition in the United States and establish procedures for the determination of eligibility standards for partici-

pation in such competitions . . ." and to "recommend to the Corporation (the USOC) individuals and teams to represent the United States in the Olympic Games . . . ." 36 U.S.C §§ 393(5) and (6). The acts of which plaintiff complains as "group boycott" violations of the antitrust laws appear to have been sanctioned by Congress.

Plaintiff has not demonstrated that there is a substantial probability that he will succeed on his pendent Cartwright Act and common law claims; *see Partee v. San Diego Chargers Football Co.*, 34 Cal. 3d 378 (1983). Plaintiff has not demonstrated that there is a substantial probability that he will prevail on his due process, equal protection and civil rights claims; he has failed to provide any evidence that any of the defendants are "state actors", *see DeFrantz v. United States Olympic Committee*, 492 F. Supp. 1181 (D.D.C. 1980), *aff'd.* 701 F. 2d 221 (D.C.Cir. 1980).

Plaintiff has also failed to demonstrate that serious questions are raised and that the balance of hardships tips sharply in his favor.

Dated: 5/29/84

/s/ Consuelo B. Marshall
CONSUELO B. MARSHALL
United States District Judge

ADDENDUM G

INTERNATIONAL OLYMPIC CHARTER 1985

OLYMPIC CHARTER 1985

(Excerpts)

RULES

1. FUNDAMENTAL PRINCIPLES

1 The aims of the Olympic Movement are:

—to promote the development of those physical and moral qualities which are the basis of sport.

—to educate young people through sport in a spirit of better understanding between each other and of friendship, thereby helping to build a better and more peaceful world,

—to spread the Olympic principles throughout the world, thereby creating international goodwill,

—to bring together the athletes of the world in the great four-yearly sport festival, the Olympic Games.

2 The Olympic Games consist of the Games of the Olympiad and the Olympic Winter Games.

In this Charter, the expression "Games" means the Games of the Olympiad, and the expression "Winter Games" means the Olympic Winter Games.

The expression "Olympiad" means a period of four successive years which follows the Games.

The first Olympiad of modern times was celebrated in Athens in 1896, and subsequent Olympiads and Games are numbered consecutively from that year, even though it has been impossible to hold the Games in every Olympiad.

3 The Olympic Games take place every four years. They unite Olympic competitors of all countries in fair and equal competition.[1]

The International Olympic Committee (IOC) shall secure the widest possible audience for the Olympic Games.

No discrimination in them is allowed against any country or person on grounds of race, religion or politics.

4 The IOC governs the Olympic Movement and owns the rights over the Olympic Games. Its constitution and powers are set out in the present Rules and bye-laws.

Every person or organization that plays any part whatsoever in the Olympic Movement shall accept the supreme authority of the IOC and shall be bound by its Rules and submit to its jurisdiction.

• • • •

9 The Games are contests between individuals and teams and not between countries.

10 The Olympic Games are the exclusive property of the IOC which owns all rights over their organizations and exploitation and over their transmission and reproduction by any means whatsoever. The IOC may grant concessions or licences in respect of these rights.

Any surplus derived from the holding of the Olympic Games must be applied to the promotion of the Olympic Movement or to the development of sport.

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[1] See Rule 32 for the duration of the Games.

II. THE INTERNATIONAL OLYMPIC COMMITTEE

11 Juridical status, objects and powers

The IOC was created by the Congress of Paris of 23rd June 1894; it was entrusted with the control and development of the modern Olympic Games.

It is a body corporate under international law having juridical status and perpetual succession. Its headquarters are in Switzerland. It is not formed for profit and has as its aims:

—to encourage the organization and development of sport and sports competitions;

—to inspire and lead sport within the Olympic ideal, thereby promoting and strengthening friendship between the sportsmen of all countries;

—to ensure the regular celebration of the Olympic Games;

—to make the Olympic Games ever more worthy of their glorious history and of the high ideals which inspired their revival by Baron Pierre de Coubertin and his associates.

12 Membership

The IOC is a permanent organization. It selects such persons as it considers qualified to be members, provided that they speak French or English and are citizens of and reside in a country which possesses an NOC recognized by the IOC. The IOC welcomes them into membership with a brief ceremony during which they accept the required obligations and responsibilities.[1]

There shall be only one member in any country except in the largest and most active countries in the Olympic Movement, and in those where the Olympic Games have been held, where there may be a maximum of two.

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[1] See page 38.

Members of the IOC are representatives of the IOC in their countries and not their delegates to the IOC. They may not accept from governments or from any organizations or individuals instructions which shall in any way bind them or interfere with the independence of their vote.

Members who resign after long and active service in the IOC may be considered for election as honorary members upon the proposal of the Executive Board. Such honorary members may attend the Olympic Games and the Congress under the same conditions as the IOC members.

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23 Supreme authority

The IOC is the final authority on all questions concerning the Olympic Games and the Olympic Movement.

On all matters, including matters of discipline affecting all concerned, and for permanent and temporary penalties of all kinds, the heaviest of which are: suspension, expulsion, disqualification, exclusion, the powers of the IOC are paramount. It delegates to the IFs, however, the technical control of the sports which they govern. The delegation of judicial power is set out in a bye-law.

III. THE NATIONAL OLYMPIC COMMITTEES

24 [1] National Olympic Committees

A. *Principles*

For the furtherance of the Olympic Movement throughout the world, the IOC shall recognize as NOCs entitled to call themselves by that name, committees that are established in accordance with the under-mentioned principles, that enforce Rules and bye-laws of the IOC, and having, if possible, legal status.[2]

In the case of an IOC being in an irregular situation beyond its control necessitating its suspension by the IOC, the Executive Committee of the NOC remains its unofficial representative. The Executive Board of the IOC can, upon advice from the member(s) of the NOC of this country or this region, should the occasion arise, authorize the participation of this executive committee in Olympic meetings, until such time as the situation be settled definitively.

B. *Objects*

The object of NOCs, in accordance with the fundamental principles contained in these Rules, shall be to ensure the development and safeguarding of the Olympic Movement and sport. NOCs shall be the sole authorities responsible for the representation of their respective countries at the Olympic Games as well as at other events held under the patronage of the IOC, and to see that arrangements are made for the organization of other events when they are held in their own country.

The IOC may help the NOCs to fulfil their mission through the Olympic Solidarity programme.

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[1] See page 41.

[2] See also "Model Constitution for a National Olympic Committee", page 101.

C. *Autonomy*

NOCs must be autonomous and must resist all pressures of any kind whatsoever, whether of a political, religious or economic nature. In pursuing their objectives, NOCs may co-operate with private or government organizations. However, they must never associate themselves with any undertaking which would be in conflict with the principles of the Olympic Movement and with the Rules of the IOC.

D. *Composition*

Whatever form their constitution may take, NOCs must in any event include in their membership:

—the members of the IOC in their country, if any. Such IOC members shall, as of right, also be members of the Executive Committee (inner committee, administrative committee or the executive) and shall have the right to vote on it in both the General Assembly and the Executive Committee (inner committee, administrative committee or the executive);

—all the national federations affiliated to the IF recognized by the IOC as controlling their sport (with a minimum of five federations, at least three of which must govern a sport included on the Olympic programme) or the representatives they have nominated. These national federations or their representatives as chosen by them must also constitute the voting majority on this NOC and its Executive Board;

—where it is a question of specifically Olympic matters, only the votes of the NOC's Executive Board and of the national federations affiliated to an IF governing a sport included in the Olympic programme are taken into consideration.

E. *Name*

The name of an NOC must reflect the territorial extent and tradition of that country, and must be approved by the IOC.

F. *Flag and Emblem*

The flag and the emblem used by an NOC at the Olympic Games shall be submitted to and approved by the Executive Board of the IOC.[1]

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BYE-LAWS

TO RULES 6 AND 53

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2. Every NOC shall be responsible to the IOC within its country for the due observance of Rule 6 and its bye-law. It shall take steps to secure that any use of the Olympic flag, symbol, flame or motto which is in breach of this Rule and bye-law thereto shall be discontinued. It shall also endeavour to secure for the IOC protection for the terms "Olympic" and "Olympiad".

• • • •

8. An NOC that wishes to use its Olympic emblem for commercial purposes, whether such use be by that NOC itself or through the agency of a third party to whom the NOC is contractually or otherwise bound, shall be deemed to have undertaken to observe this bye-law and to secure its observance by third parties. The use of the emblem for advertising, alcoholic beverages or tobacco is strictly prohibited.

• • • •

TO RULE 63

The sovereign or Head of State who has been invited to open the Olympic Games shall be received at the entrance of the stadium by the President of the IOC and by the President of the OCOG. The two Presidents shall conduct the sovereign or Head of State and his retinue

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[1] See also bye-laws to Rules 6 and 53.

to his box in the stand of honour where he shall be greeted with his anthem.

The parade of the participants shall then follow. Each delegation dressed in its official uniform must be preceded by a name-board bearing its name and must be accompanied by its flag.

No participant in the parade is permitted to carry cameras, flags, banners, etc. on the field during the opening and closing ceremonies. Any participant committing a breach of the above regulations, will be liable to sanctions according to Rule 23. The OCOG shall see that these provisions are carried out.

The contingent shall parade in alphabetical order according to the language of the country organizing the Olympic Games, except that Greece shall lead the parade and the organizing country shall bring up the rear. Only those who are competing in the Olympic Games, and no more than four non-competitors in each delegation, shall parade.

The delegations shall salute the sovereign or Head of State of the country by turning their heads toward his box, with no other demonstration. The flags of the participating delegations, as well as the name-boards and their bearers, shall be furnished by the OCOG and shall all be of equal size. Each contingent, after completing its march around the stadium, shall line up in the centre of the field and maintain its position in a column behind its name-board and flag facing the stand of honour.

The President of the OCOG, accompanied by the President of the IOC, shall then proceed to the rostrum placed on the field in front of the stand of honour where he shall introduce the President of the IOC in the following words:

"I have the honour to introduce . . ., President of the International Olympic Committee, to whom I extend the warmest welcome."

The President of the IOC shall then mount the rostrum, and deliver a brief speech of welcome, of not more than three minutes, concluding with the words:

"I have the honour to invite . . . (the sovereign or Head of State) *to proclaim open the Games of the . . . Olympiad of the modern era, initiated by Baron Pierre de Coubertin in 1896* (or *of the . . . Olympic Winter Games*)."

The sovereign or Head of State shall then say:

"I declare open the Games of . . . (name of city) *celebrating the . . . Olympiad of the modern era* (or *the . . . Olympic Winter Games*)."

Immediately a fanfare of trumpets shall be sounded and, to the strains of the Olympic anthem, the Olympic flag shall be slowly raised on the flagpole erected in the arena.

A symbolic release of pigeons precedes the arrival of the Olympic flame, brought from Olympia by a relay of runners, the last of whom, after circling the track, shall light the sacred Olympic fire which shall not be extinguished until the close of the Olympic Games.

The solemn Olympic oath shall be then taken in the following ceremony:

The flag bearers of all countries shall advance and form a semicircle around the rostrum; an athlete of the country where the Olympic Games are taking place shall then advance to the rostrum; he shall mount the rostrum and, holding a corner of the Olympic flag in his left hand, and removing his hat, shall raise his right hand and take the following oath on behalf of all the athletes:

"In the name of all the competitors I promise that we shall take part in these Olympic Games, respecting and abiding by the Rules which govern them, in the true spirit of sportsmanship, for the glory of sport and the honour of our teams."

Immediately after, a judge of the host country shall then advance to the rostrum and similarly take the following oath on behalf of all the judges and officials:

"In the name of all the judges and officials, I promise that we shall officiate in these Olympic Games with complete impartiality, respecting and abiding by the Rules which govern them, in the true spirit of sportmanship."

The anthem of the organizing country shall then be played or sung. The participants shall then leave the arena by the shortest route.

The official ceremony according to the protocol described above so comes to an end. Only then may any artistic programme and the competitions take place.

In the case of an opening ceremony being authorized by the IOC to be held at a secondary Olympic venue, the rules of protocol described above shall not apply, but the OCOG must submit details of the ceremony in advance to the IOC (at least one year).

TO RULE 64

Medals and diplomas

In individual events the first prize shall be a silver-gilt medal and a diploma, the second prize a silver medal and a diploma, and the third prize a bronze medal and a diploma. The medals must bear the name of the sport concerned and be fastened to a detachable chain or ribbon to be hung around the neck of the athlete. Diplomas but not medals shall also be awarded for the fourth, fifth, sixth, seventh and eighth places, if any. All participants in a tie for first, second and third places shall be entitled to receive a medal and a diploma.

Prize medals shall be at least 60 mm, in diameter and 3 mm thick. The first and second place medals shall be of silver of a fineness of at least 925/1000 and the first place medal shall be heavily gilded containing at least 6 g of pure gold.

In team sports and in team events included in other sports, except those of an "artificial" nature (i.e. those in which placings are determined by position of the contestant in the individual competition), each member of a winning team participating in at least one match or competition held during the Olympic Games shall be awarded a silver-gilt medal and a diploma, each member of the second team a silver medal and a diploma, and each member of the third team a bronze medal and a diploma. The other members of these teams are awarded diplomas but no medals. In "artificial" team events only one medal shall be given to the team and its members shall receive diplomas only. Members of teams placed fourth, fifth, sixth, seventh and eighth, if any, shall be awarded diplomas only.

All competitors and officials in the Olympic Games shall receive a diploma and a commemorative medal.

The names of all winners shall be inscribed upon the walls of the main stadium where the Olympic Games have taken place.

Diplomas and commemorative medals shall be given to all non-competitors who are officially attached to Olympic teams and are recognized by the NOC of their country within the limits of the numbers laid down in Rule 37 and its bye-law.

The members of the IOC, the Presidents and Secretaries General of the IFs recognized by the IOC and of the NOCs who are present at the Olympic Games, as well as judges, referees, timekeepers, inspectors, umpires, etc., officiating at the Olympic Games and officially appointed by the IOC shall also be given diplomas and commemorative medals according to scales fixed by the IOC.

The medals and diplomas distributed on the occasion of the Winter Games must be different from those of the Games of the Olympiad.

No diplomas or commemorative medals shall be awarded to competitors or members of an NOC who did not take any part in the Olympic Games or who withdrew from them.

No prizes or awards other than those described above shall be given at the Olympic Games, and all surplus medals and diplomas shall be delivered up to the IOC.

If an Olympic competitor is disqualified, his medal and diploma must be returned to the IOC. If this is not done, the NOC shall be liable to suspension.

The OCOG shall ensure that a valid assignment of the copyright in the medals referred to in this Rule is made by all the designers thereof in favour of the IOC which shall *ipso facto* be the recognized owner of the copyright. If the law of the country requires that an assignment must be made in writing, the OCOG shall be obliged to draw up the necessary document to have it signed by all necessary parties and deliver it to the IOC which shall thereupon be the sole person entitled to make any disposition of such copyright.

The OCOG must hand over the moulds of all medals and all surplus medals to the IOC after the Olympic Games.

TO RULE 65

The medals shall be presented during the Olympic Games by the President of the IOC (or a member selected by him), accompanied by the President (or his deputy) of the IF concerned, if possible immediately after the event at the place where the competition was held and in the following manner: the competitors who have been judged first, second and third take their places, in their official uniform, on a stand in the stadium facing the stand of honour, with the winner slightly above the second who is on his right and the third who is on his left. The flag of the winner's delegation shall be

hoisted on the central flagpole and those of the second and third on adjoining flagpoles on the right and on the left, as they face the arena. Meanwhile the anthem (abbreviated) of the winner's delegation is played, during which the three competitors and the spectators shall face the flags.

TO RULE 66

The closing ceremony must take place in the stadium at the conclusion of the last event. The bearers of the flags of the participating delegations shall march into the arena in single file behind bearers of their name-boards in the same order and shall take up the same positions in the centre of the field as in the opening ceremony. Behind them six competitors of each delegation who came to participate in the Olympic Games shall march, eight or ten abreast, without distinction of nationality united only by the friendly bonds of Olympic sport.

The flag bearers shall then form a semi-circle behind the rostrum.

The President of the IOC shall then proceed to the foot of the rostrum. To the strains of the Greek national anthem, the Greek flag shall then be hoisted on the flagpole that stands to the right of the central flagpole used to hoist the winners' flags. The flag of the host city's country shall then be hoisted on the central flagpole, while its anthem is played. Finally the flag of the country of which the city has been selected to organize the next Olympic Games shall be hoisted on the left-hand flagpole to the strains of its anthem.

The President of the IOC shall then mount the rostrum and pronounce the closing of the Olympic Games in the following words:

"*In the name of the International Olympic Committee I offer to . . . and to the people of . . .* (name of the sovereign or Head of State and name of the country),

to the authorities of the city of . . . (name of the city) *and to the Organizing Committee of the Games, our deepest gratitude. I thank the competitors, officials, spectators, the media and all those who have contributed to the success of these Games. I declare the Games of the . . . Olympiad* (or *the . . . Olympic Winter Games) closed and, in accordance with tradition, I call upon the youth of all countries to assemble four years from now at . . .* (in case the city has not yet been chosen, the name of the city is replaced by the words: *the place to be chosen), there to celebrate with us the Games of the . . . Olympiad* (or *the . . . Olympic Winter Games).*"

The Mayor of the city organizing the next Olympic Games shall then join the President of the IOC on the rostrum. A representative of the city where the Games of the Olympiad have just been held shall deliver the official Olympic flag (of embroidered satin presented in 1920 by the Belgian Olympic Committee) to the President of the IOC who shall hand it over to the Mayor. For the Winter Games there is another flag, presented in 1925 by the city of Oslo. The flags must be kept in the principal municipal building of the city organizing the next Olympic Games until the closing ceremony.

A fanfare shall then be sounded and the Olympic flame extinguished, and to the strains of the Olympic anthem, the Olympic flag shall slowly be lowered from the flagpole and carried horizontally from the arena by a group of eight men in uniform. A salute of five guns shall follow: the choir shall sing and then the standard and flag bearers and the competitors shall march out to the sound of music.

ADDENDUM H

[Excerpts]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil Action No. 83-278

UNITED STATES OLYMIC COMMITTEE,
Plaintiff

v.

MILLSPORT, INC., *et al.*,
Defendants

Civil Action No. 83-44

INTERNATIONAL SPORTS MARKETING, INC.

v.

INTERNATIONAL OLYMPIC COMMITTEE, and
UNITED STATES OLYMPIC COMMITTEE,

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

• • • •

II. Findings of Fact.

• • • •

10. As found by this court in CA 83-44 (April 27, 1983)

> The [U.S. Olympic Committee's] primary purpose is to supervise the raising and expending of funds to field American teams for the winter and summer Olympic Games. These funds are raised by selling the right to associate a product with the Olympic Movement and by soliciting contributions from private individuals in exchanges for items of merchandise displaying the Olympic symbol—five interlocking rings—in combination with various graphics and other Olympic-related terminology.

The USOC is federally chartered; it organizes and implements, as well as finances, the representation of the United States in the Olympic games.

11. On the uncontradicted testimony of Colonel Miller, which the court finds credible, the court finds that there are 153 countries with National Olympic Committees, that the USOC is unique among them in not having formal support from the government, that the USOC with an $80.1 million budget receives some 44.6% of its income from its 44 corporate sponsors and 36% from contributions and spends less than 8% for the purpose of sending athletes to the games, using the balance to operate a training center program and a sports medicine center, as well as educational programs and the National Sports Festival. The USOC budget is about twentieth in the world in rank, with the U.S.S.R. spending most on the Olympics and East Germany the next.

12. The USOC rejected the Intelicense program and proposals for the marketing of pictograms because it would dilute the market in terms of the USOC's obtaining corporate sponsors and because the Intelicense pro-

posal would also tend to dilute the market for the up to two million gold and fifty million silver coins to be minted by the United State Mint and sold pursuant to U.S. law under the agreement between the Treasury of the United States and USOC contained in USOC Exhibit 20.

13. The USOC has entered into contractual agreements with approximately 100 of the NOCs whereby they will receive 4% of the proceeds from the gold coins which will sell for $250 or the silver coins which will have a $10 surcharge. Direct mail, with "donor award" items such as key chains and belt buckles using the Olympic symbol as an incentive, is a principal method of fundraising by the USOC for individuals.

14. The USOC conducts a corporate participation program to obtain funding from business. Under this program, participants or sponsors are authorized to identify one or more products or services with the USOC, the U.S. Olympic Team or with the United States Olympic Training Center during a four-year Olympiad. Only one participant is authorized exclusively by the USOC in any category of products or services. Corporations participating in this program make a minimum guaranteed monetary contribution to the USOC; they also contribute products or services.

• • • •

18. One important and the court finds a typical USOC corporate sponsor is Levi Strauss & Company, its sponsorship or participation agreement being USOC Exhibit 18. Levi Strauss will be investing $50 million in a four-year public relations and promotion program in connection with the forthcoming Olympic Games and will be using Olympic emblems in the United States and at Los Angeles in connection with the advertising of Levi Strauss products. Levi Strauss sells in Sears, Penney's, Mervin's, and other large chains some $2 billion worth of merchandise per year. To date it has invested in excess of $60 million in products bearing the Olympic logo. Levi

Strauss sought to do business with the NOCs of various other countries but was able to negotiate contracts only with Canada, Mexico, and Japan. Exclusivity is a vital component of the Levi Strauss sponsorship; if it did not have an exclusive arrangement in connection with its products for the use of the Olympic symbols, it would not deal with the USOC. The Olympic five rings symbol is part and parcel of the exclusive commitment.

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III. Conclusions of Law

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The congressional intent in enacting section 380 was to promote the U.S. Olympic effort by entrusting to the USOC alone the right to use and control the commercial exploitation of Olympic designations in the United States. Since the USOC is not supported by government funds but by contributions from the private sector, the Act expressly empowers the USOC to authorize "contributors and suppliers" to use the Olympic symbol and subjects anyone who uses the symbol "for the purpose of trade" without the consent of the USOC to civil sanctions in actions brought by it. *See generally Stop the Olympic Prison v. United States Olympic Committee*, 489 F. Supp. 1112 (S.D.N.Y. 1980), where the plaintiff's poster was not used "for the purpose of trade" or "to induce the sale of any goods or services or to promote any theatrical exhibition, athletic performance or competition" and the court held that this use of the Olympic symbol did not violate the statute, 489 F. Supp. at 1121. The court nevertheless recognized that the purpose of section 380 was "to establish strong protection for the Olympic symbols, in part to insure the market value of licenses for their use. Recent experience has shown such licensing to be a substantial inducement for contributions from a wide variety of commercial corporations, and the draft-

ers of subsections (b) appear to have this certainly in mind." *Id.* at 1120.

• • • •

/s/ James L. Oakes
United States Circuit Judge
sitting by designation as
United States District Judge

[1983]

[*aff'd sub nom. USOC* v. *Intelicense Corp.*, 737 F.2d 263 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984).

ADDENDUM 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 84-5515-RG

UNITED STATES OLYMPIC COMMITTEE
(a Federal non-profit corporation),
Plaintiff,

vs.

VARIOUS JOHN DOES,
Defendants.

FINAL JUDGMENT AND PERMANENT INJUNCTION AS TO DEFAULTING JOHN DOE DEFENDANTS

Plaintiff United States Olympic Committee ("USOC"), having duly commenced this action by filing the complaint herein against Various John Does alleging violation of its rights in connection with the five interlocking rings and word "Olympics" (collectively the "USOC" marks"); and service of the complaint having been made on the person identified in Exhibit A hereto as a John Doe defendant; and merchandise of said defendants having been impounded under order of this Court, which merchandise is further described in Exhibit A ("the infringing merchandise"); and said defendants having failed to contest said impounding of their merchandise or to appear herein or to respond to the complaint; and it appearing to the Court that judgment by default is appropriate; and the Court having determined that there is no just reason for delay of entry of judgment against said defendants;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338, 36 U.S.C. § 380 and 15 U.S.C. § 1121, and the principles of pendent jurisdiction. This Court has jurisdiction over the parties to this suit and retains such jurisdiction for the purposes of any contempt proceeding or other enforcement action stemming from this action.

2. The complaint herein shall be deemed amended to add as defendants in their own name the persons identified in Exhibit A hereto.

3. The defendants identified in Exhibit A hereto, and the defendants' related business entities, agents, employees, representatives, servants, successors and assigns, and any and all persons acting by or under the defendants' authority or acting in concert or participation with the defendant are permanently enjoined from distributing, circulating, selling, offering for sale, advertising, promoting or displaying the infringing merchandise.

4. The infringing merchandise shall be delivered to the United States Olympic Committee for appropriate disposition.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that this judgment against said defendants can be entered forthwith pursuant to F.R.C.P. 54(b).

DATED: 6 Feb 1985.

/s/ Richard A. Gadbois, Jr.
RICHARD A. GADBOIS, JR.
Judge, U.S. District Court

EXHIBIT A

Infringer (s)	Merchandise	Nature of Infringement
Kamal Abdou	Beach mats	Star-in-motion & Olympic rings
Abutaleb Abourerr	T-shirts	Olympic rings
Adrian	T-shirts	Star-in-motion LA-in-motion
David Adrman	T-shirts & hats	Use of word Olympics
Floyd Aragon	Bumper stickers	Use of word Olympics
Andrew Armada	Spoons, key chains	Use of word Olympics and olympic rings
Adrian Arroyo	T-shirts	Use of word Olympics
William Atlas	Buttons	Olympic Rings Use of word Olympics
Douglas Augr	T-shirts	Stick figures & torch
Bill Baccerer	Scrolls	Use of word Olympics
Kim Bane	T-shirts	Olympic rings and star-in-motion
Anthony Barbetta	T-shirts	Use of word Olympics
Robert Barbosa	T-shirts	Use of word Olympics
Mike Barham	Bumper stickers	Star-in-motion
Mike Barrett	Certificates	Use of word Olympics
Ron Barros	T-shirts	Use of word Olympics & rings
Sharon Bell	Sunglasses	Olympic rings
Wolfson Bonner	Sunglasses	Olympic rings
Judy Browdy	Change purses	Use of word Olympics
Joseph Bruno	T-shirts	Olympic rings
Gary Brownstein	T-shirts	Star-in-motion
David Allen Burke	T-shirts	Olympic rings
James Butts	Mugs	Use of word Olympics
Carol's Florist	Spoons	Sam Eagle & use of word Olympics
Carlos Carllejo	T-shirts	Olympic rings
Lucia Castro	T-shirts	Olympic rings
Sam Chung	Key chains & T-shirts & spoons	Use of word Olympics star-in-motion & rings
Blake Coleman	Hats & T-shirts & Pins	Use of word Olympics & Rings & star-in-motion
Kay Coleman	T-shirts and hats	Olympic rings and star-in-motion
Johnnie Cochran	T-shirts	Star-in-motion

Infringer (s)	Merchandise	Nature of Infringement
Kathy Cox	Sunglasses	Olympic rings
Leonard Davis	T-shirts	Use of word Olympics
Richard Davis	Sunglasses	Olympic rings
Javier Delealle	Posters	Use of word Olympics
Denmarst	Blue cooler handbags	Use of word Olympics
Tom Dilbon	T-shirts	Use of word Olympics and Olympic rings
Jellidie Dudley	Sunglasses	Olympic rings
Dynaiaic Mkt. Sym.	Cooler bags	Use of word Olympics
Leslie Fegney	Buttons	
Lori Ferguson	Sunglasses	Olympic rings
Mary Fitzpatrick	Pins	Use of word Olympics & rings
Martin Fliderman	T-shirts	Olympic rings
Ignacis Fonsea	Stockers	Olympic rings
Larry Garrett	Gold medals	Use of word Olympics
Bill Gilbert	Visors	Star-in-motion & Olympic rings
Mohammed Reda Grady	T-shirt	Olympic rings
Tawld Gregado	T-shirts	Olympic rings
Joydeep Ghosm	T-shirts	Olympic rings
Mitchell Greenback	T-shirts	Use of word Olympics
Torres Guadalupe	Pins	Olympic rings
Leon Hall	T-shirts	Use of word Olympics and rings
Yvette Holayer	Keyrings	Star-in-motion
Hollywood Stars	T-shirts	Olympic rings
Chung Joon Hwa	T-shirts	Olympic rings
Chube Ikpuazy	T-shirts	Use of word Olympics
Judy Johnson	Buttons	Use of word Olympics
Alvin Jones	T-shirts	
Jackie Jones	T-shirts	Olympic rings
Janine Jones	Key rings	Use of word Olympics
Dean Katz	Buttons & bumper stickers	Olympic rings
Kaap Koong	Pins	Olympic rings
Steve Kotish	T-shirts	Use of word Olympics
Don Lennon	T-shirts	U.S.A.-in-motion
Hubert Lester	Key rings	Use of word Olympics

Infringer(s)	Merchandise	Nature of Infringement
Ron Liebirnis	T-shirts	Olympic rings
Humberto Lopez	Pins	Use of word Olympics
Amir Magahab	Cooler bags	Use of word Olympics
Michael Maier	T-shirts	Olympic rings
James McGrata	Buttons & bumper stickers	Olympic rings
Brenda McMay	T-shirts	Use of word Olympics
Pat McKay	T-shirts	Olympic rings
Vernon McMurry	Buttons	Olympic rings
Chris Metoyer	Wallets	Use of word Olympics
Isidra Medina	Medals & buttons	Olympic rings and star-in-motion
Talib Mohammed	T-shirts	Olympic rings
El Gabra Molaz	T-shirts	Olympic rings
Linda Moritz	T-shirts	Star-in-motion
Robert Mott	Posters	Use of word Olympics
Nanette Newbury	T-shirts	Olympic rings
Rory O'Flaherty	Magazines	Use of word Olympics
Laura Onate	Key rings, pens, t-shirts	Olympic rings
Johnny Otero	Buttons	Use of word Olympics
Marida Patron	T-shirts	Olympic rings
Gary Allen Pavlenkov	Glasses	Olympic rings
James Pelle	Patches	Star-in-motion
Tony Petterson	Posters	Use of word Olympics
Richard Pinkard	T-shirts	Use of word Olympics
David Powers	T-shirts	Use of word Olympics
Tabo Pubill	Hats	Sam Eagle & star-in-motion
David Quan	T-shirts	Olympic rings
Rargeb	T-shirts	Olympic rings
Jogl Resnlgoff	T-shirts	Use of word Olympics
Melvyn Richardson	Visors & hats	Star-in-motion and Olympic rings
Joanie Rig	T-shirts	Olympic rings
Tony Rivera	T-shirts	Star-in-motion
Brian Roberts	Star hats	Use of word Olympics
Charles Romero	Posters	Use of word Olympics
Michael Roms	Buttons	Olympic rings
Adam Rosenbaum	Buttons	Olympic rings

Infringer (s)	Merchandise	Nature of Infringement
Daniel Rosenbaum	Buttons & bumper stockers	Olympic rings
David Rosenbaum	T-shirts	Olympic rings
Wayne Ross	Plastic visors	Use of word Olympics, star-in-motion and Olympic rings
Armondo Salas	Posters	Olympic rings
Brenda Gail Seales	Decorative plates	Use of word Olympics
Judith Seller	Keychains	Olympic rings
Jim Sellers	Hats (painters)	Use of word Olympics and rings
Anthony Seruto	T-shirts	Use of word Olympics
Frank Shaw	Buttons	Use of word Olympics
Diane Shoenbaum	Sunglasses	Olympic rings
Sameerad Somag	Sunglasses	Olympic rings
Ed Soules	T-shirts	Olympic rings
D.E. Sparks	Necklaces	Olympic rings
Edward Sparks	Ceramics necklaces & Ceramic banks	Olympic rings
Lisa Spillman	T-shirts	Use of word Olympics star-in-motion
Allen Stein	Hats	Use of word Olympics & Olympic rings
Marvin Stein	Visors	Olympic rings
Keven Strachan	T-shirts	Olympic rings
Sunset Sales	T-shirts	Olympic rings
Tandem Merchandising	T-shirts	Use of word Olympics
Thomas Teichman	Paperweights	Olympic rings
Gregore Turneir	T-shirts	Star-in-motion & rings
Tom Vocatura	Posters	Use of word Olympics
Ben Warren	T-shirts	Star-in-motion
Alan Werschler	T-shirts and hats	Star-in-motion
Tuowg Wgoyen	T-shirts	Olympic rings
Mike Yingst	Hats & Fans	Use of word Olympics
Robert Yocatura	Posters	Olympic rings
Zenzi	Bumper stickers	Olympic rings
Unidentifiable John Does	T-shirts & hats & fans & certificates & bumper stickers & sunglasses & mugs	Star-in-motion and Olympic rings and use of word Olympics and Sam the Eagle

Supreme Court, U.S.
FILED
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CLERK

No-86-270

In the Supreme Court of the United States

OCTOBER TERM, 1986

SAN FRANCISCO ARTS & ATHLETICS, INC.
and THOMAS F. WADDELL, M.D.,

Petitioners,

vs.

UNITED STATES OLYMPIC COMMITTEE
and INTERNATIONAL OLYMPIC COMMITTEE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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I. THE INSTANT CASE REMAINS A DISPUTE ABOUT A SMALL NON-PROFIT CORPORATION'S POLITICAL AND EXPRESSIVE USES OF AN ANCIENT GENERIC TERM, IN THE DISTINCTIVE CONTEXT OF THE PROPOSED "GAY OLYMPIC GAMES".

In their brief on the merits, respondents USOC et al. (below, "USOC") seek to suggest that the word "Olympic" was used by petitioners SFA&A and Dr. Waddell (below, "SFA&A") in a manner that disassociated it from the word "Gay", and from the context of the human and civil rights movement for persons of minority sexual orientations, of which the "Gay Olympic Games" were intended and designed to be a part. (Brief for Respondents (below, "R.Br.") 2- 3, 11).

This effort by USOC to sever the philosophical and linguistic links between "Olympic" and "Gay" in this case, so as to depict SFA&A as just another crass and profit-crazed[1] commercial imitator of the Olympics, must fail on the record

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[1]Going outside the record to cite newspaper articles, USOC argues that SFA&A's budget for the 1986 Gay Games was 'magnitudes larger' than the $400,000. that the Gay Games cost SFA&A to present in 1982. (R.Br. 8 n.7) Presumably, this improper departure from the record by USOC is gauged to persuade this Court that SFA&A is a financial gargantua in disguise, whose use of "Olympic" to identify and promote its proposed "Gay Olympic Games" actually could pose a genuine threat to USOC's economic stability and fund raising capacities. Because USOC has gone outside the record to create a picture of SFA&A as a sizeable and financially comfortable organization that might menace USOC's fund-raising by use of "Olympic", and because that picture is both grossly false as to SFA&A, and severely slanted against this Court's recognition of USOC's own real economic situation, SFA&A is obliged to reply, from outside the record in part, that in 1985, USOC received at least $75 million from a surplus estimated at between $150 and $225 million from the 1984 Summer Olympics in Los Angeles. Dolan, *Giant Olympic Surplus Spills Over Into Anger*, Los Angeles Times, November 1, 1984, pp. 1, 21-22; King, *Panel Begins Parcelling Out L.A. Games Surplus*, Los Angeles Times, December 10, 1985, p. 10; *The Olympic Surplus: Who Gets The Gold?*, Newsweek, November 26, 1984, p.48. USOC also received at least $68 million from the U.S. government in contributions to the 1984 Games. *Id., Los Angeles Times*, November 1, 1984. (Compare J.A. 189-190, where USOC represents in response to interrogatories that it has received only $16.3 million altogether from the U.S. government). Of record, SFA&A's small-scale and struggling financial situation is extant. In staying the enforcement of the $96,600. attorneys' fees award by USOC against SFA&A, one Circuit Judge had occasion to observe that SFA&A was in "dire financial straits". (J.A. 344). The record also establishes that petitioners claimed to have lost an "incalculable" amount, that included $43,118. in measurable destroyed property, because of the injunction issued against their use of "Olympic" in 1982. (J.A. 223-224). If it is USOC's purpose in going outside the record to suggest that SFA&A did not suffer losses by USOC's suit, or could easily sustain them, the record itself defeats that suggestion. If USOC is trying to imply that *it* has been harmed by SFA&A's use of "Olympic", it is noteworthy that USOC never pressed nor proved any claim for monetary damages against SFA&A. (P.Cert. App. 1 pp.2-3).

in this case. Petitioners' uses of "Olympic" in their literature, speech and paraphernalia were in repeated, obvious and unbroken conjunction with the term "Gay"; the few occasions in which there were references to the "Olympic" Headquarters and Committee for the Gay Olympic Games occurred in the inescapable context of literature about the Gay Olympic Games. The term "Olympic" used by petitioners never appeared in any document that did not also contain the word "Gay", and in almost every instance the word "Gay" appeared immediately beside the word "Olympic". (J.A. 352-353, 361, 402-404). Moreover, SFA&A never used any Olympic symbol, insignia, trademark or emblem protected by section 380 of the Amateur Sports Act, other than the words "Olympic", "Olympics", and "Olympiad". (J.A. 100 (including reference to three (3) disks, not rings), 115; R.17 at Ex.'s A-E, G-U, BB-DD, II, JJ).

In its effort to paint SFA&A's Gay Games as an apolitical replica of the Olympics, USOC simply leaves out the true colors of the Gay Games. USOC omits mention of each facet of the Gay Games that is distinctive, from the 1982 torch run from Stonewall in New York City, the reputed birthplace of the modern gay/lesbian rights movement (J.A. 98, 113, 355) to the recognizably non-Olympic sports included in the Gay Games, including billiards, bowling, rugby, softball and physique. (J.A. 100, 354). USOC omits all reference to the open criticism of and disassociation with USOC's Olympics in SFA&A's literature (See eg. R.17 at Ex. I). Most flagrantly misleading of all, USOC neglects any meaningful mention of the declaredly political and expressive purposes and means of the proposed "Gay Olympic Games", which pervade SFA&A's literature as well as the record below as to the motives of SFA&A's participants and volunteers. (J.A. 90-116, 349-350, 352-364).

USOC's attempt to rewrite the record in this case, apparently to create an image of SFA&A as a conscientious copier of the Olympics, undeserving of legal protection, is factually insupportable. If USOC makes this effort to

convince this Court that there is no triable dispute of material fact as to whether SFA&A's use of "Olympic" tended to cause confusion, mistake, deception or false association with USOC, that effort must fail as a matter of law. The U.S. Court of Appeals for the Ninth Circuit specifically determined that "[b]ecause confusion between USOC's and SFAA's use was a disputed question of fact, the summary judgment can be sustained only if the Act does not require confusion." (P.Cert. App.1, p.4).

II. THE CLARIFICATION AND CIVIL ENFORCEABILITY OF USOC'S TRADEMARKS WERE THE PURPOSE OF THE ENACTMENT OF SECTION 380 OF THE AMATEUR SPORTS ACT IN 1978.

USOC contends that if Congress did not give it more than a trademark, by enactment of section 380 of the Amateur Sports Act of 1978, Congress would have had no purpose in enacting that section 380. This is illogical. Congress need not have intended to grant USOC an unprecedented power to control virtually all uses of the word "Olympic" to have had a purpose in that enactment.

As to "Olympic", the obvious purpose of section 380 was to clarify and give civil enforceability to USOC's claimed trademark upon that word. That purpose is entirely borne out by the language, legislative history and thrust of section 380. Indeed, the purpose of section 380 insofar as the term "Olympic" is concerned is quite legally evident, when one considers the posture of USOC's claimed trademark upon "Olympic" without section 380. Despite whatever trademark registrations as to "Olympic" USOC made before 1978, USOC cannot have had an *enforceable* trademark on the word until section 380 was enacted. The reason for this is plain: as an obviously generic term, "Olympic" was not capable of being trademarked by USOC (or any other entity) under the Lanham Act, in that generic words cannot be trademarked under that statute. (P.Cert. 28-31). As this Court recently observed:

> "the Lanham Act allows a mark to be challenged at any time if it becomes generic, and, under certain circumstances, permits the non-trademark use of descriptive terms contained in an incontestable trademark."
> *Park 'N' Fly v. Dollar Park 'N' Fly*, 105 S.Ct. 658, 665 (1985); see also, *Anti-Monopoly Inc. v. General Mills Fun Group Inc.*, 684 F.2d 316 (9th Cir. 1982), cert. denied, 459 U.S. 1227 (1983).

Thus, it is quite plain that Congress acted purposefully and consistently in the enactment of section 380, where the term "Olympic" is concerned. Congress bestowed a trademark upon USOC by that enactment that USOC otherwise, legally, did not have; the act empowered USOC to seek Lanham Act remedies for infringements. If USOC already was entitled to Lanham Act remedies as to "Olympic" before 1978, then Congress surely would not have specifically cited that statute in its enactment.

The factors that underscore the correctness of petitioners' position as to the meaning of section 380 are several and strong: Congress' citation to the Lanham Act, along with trademark (and not anti-dilution or other) terms of art, in construction of section 380; the legislative history of section 380 (Amicus Brief of Amateur Athletic Union et al., (below, "Am.AAU" 12-28); the absence of an enforceable trademark in USOC as to "Olympic" before the 1978 enactment, as discussed above. Even without weighing the constitutional constraints upon Congress in enacting section 380 relative to "Olympic", the statute in its language, history and trademark

law posture persuade that section 380 spells "trademark" as to USOC's rights in "Olympic".[2]

III. THE EVIDENCE OF CENSORSHIP OF SFA&A IS REAL; USOC'S ABBREVIATED READING OF THE FIRST AMENDMENT AS APPLIED TO SFA&A CANNOT BE CONSTITUTIONALLY SUSTAINED.

To belittle the free speech position of SFA&A before this Court, USOC argues that petitioners "seek to conjure a vision of shadowy censors snipping words from dictionaries, or of reporters or commentators gagged so they may not utter an offending term. Such fancy has nothing to do with this case." (R.Br. 12) This rhetoric by USOC fades dramatically when juxtaposed with the factual record at bar, which shows without contradiction that petitioners and all those associated with them were compelled by a court order literally and physically to excise a 2763-year old[3] generic and widely used word, not solely from thousands of posters, buttons and t-shirts, as well as SFA&A's literature, but from their vocabularies as to the Gay Games. (J.A. 88-116). The record further establishes that "Olympics" also literally was black-inked from at least one newspaper's coverage of the

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[2]To the extent that amicus AFL-CIO joins USOC in arguing that USOC's is the only permissible interpretation of section 380 (A. AFL-CIO p.7), petitioners respectfully point out, as a procedural consideration, that amicus AFL-CIO has no conceivable interest in this trademark law issue, and, on the merits, petitioners observe that the very passages of legislative history that AFL-CIO cites for its "inescapable" statutory interpretation (A. AFL-CIO p.7) have been cited by at least one U.S. District Court to mean that USOC's hold on "Olympic" is no greater than that necessary to prevent competing trademark registrants. *Stop The Olympic Prison v. USOC*, 489 F.Supp. 1112, 1118-1121 (S.D.N.Y. 1980) (indicating that the purpose of section 380 was "to prevent all persons other than USOC from registering the Olympic words and symbols as trademarks...rather than as a blanket prohibition of all uses whether commercial or not.").

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[3]*Oxford English Dictionary* (2-vol. ed. 1971) (P.Cert. 31-33).

Gay Games. (J.A. 88-89 and Ex. A thereof). The censor's hand reached out in this case, in the form of a selectively targeting lawsuit that imposed an injunction; this occurred in real life, and not in petitioners' "fancy". (Compare R.Br. 12 and J.A. 88-116).

Moreover, when SFA&A used the term "Olympic" in a news item about a so-called Winter "Olympics", and when petitioners' co-counsel Ms. McGreivy wore her hard-earned U.S. Olympic team sweatshirt to the opening ceremonies of the Gay Games and was photographed in it there, USOC yelled "contempt" of an injunction that it now pretends had no censorious effect. (J.A. 285, 288, 302-305, 308-310; R.97 at Ex.A). Petitioners' counsel wonder, if SFA&A's agents had elected to defy the injunction, and to engage in actual contempt of court by calling their Gay Games an "Olympics", whether the fines and jail sentences flowing from such defiance would be termed the "conjur[ing of] a vision" and the product of "fancy", by USOC.

The working model of First Amendment freedoms of speech and association in USOC's brief on the merits reflect a similarly revealing and ironically limited perspective on constitutional rights. USOC proposes a "Bill of Rights" as to uses of "Olympic" to be permitted by SFA&A that bears a remarkable lack of resemblance to the real scope of the First Amendment. (R.Br. 32). USOC's "Bill of Rights", permitting SFA&A to "criticize the Olympics" by means chosen by USOC, but obviously prohibiting SFA&A from using the means it chose itself (ie. holding a "Gay Olympic Games"), purports to decide what content and meaning the word "Olympic", and USOC's activities, shall have in SFA&A's vocabulary. That USOC arrogates to itself the power to prescribe what uses of "Olympic" of a political nature are permissible admits the central First Amendment contention of petitioners: USOC is brokering the content and meaning of protected speech, by claiming a right to control political and expressive uses of "Olympic". (P.Cert. App.3 pp.31-41).

Rejecting USOC's "Bill of Rights" in favor of the U.S.

Constitution's version, SFA&A contends that its right of free expression must be not one iota less expansive than the right of the sponsors of the "Special Olympics", the "Junior Olympics", the "International[4] Police Olympics", and the dozens of others whose "Olympics", celebrating activities from nudity to rat-races and from ballet to the human mind, are either explicitly blessed or tacitly condoned (to the same legal effect) by USOC. (J.A. 93). The rigid and discriminatory constraints of USOC's "Bill of Rights" where SFA&A's use of "Olympic" is concerned are utterly disharmonious with the boundaries of the real Bill of Rights. The federal constitutional guarantees of free speech and association, especially as strengthened by the equal protection guarantee's assurance of freedom from invidious discrimination by government in the distribution of those First Amendment rights, cannot be reconciled with USOC's crabbed and censorious version of these rights as applied to petitioners.

USOC's proferred defense of its prohibition of a "Gay Olympic Games" as a time, place and manner rule is absurd, in terms of this Court's decisions as to the meaning of this doctrine. The cases USOC cites that uphold certain governmental restrictions as reasonable time, place and manner rules, without exception, do not involve injunctions prohibiting the use of particular words. *City of Renton v. Playtime Theatres*, 106 S.Ct. 925, 932 (1986) (zoning ordinance that prohibited adult entertainment theatres within certain areas left 520 acres for that use); *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45-46 (1983)(mailbox system in schools that excluded non-representing union from putting fliers in teachers' boxes was not a content-based restriction, and the school's internal mail system was not a traditional public forum); *Grayned v. City*

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[4]USOC's obfuscations as to its treatment of the "Police Olympics" (R.Br. 42 n.61) cannot hide the constitutionally crucial point that, since 1982, USOC has permitted the organizers of that annual international (J.A. 101 and Ex. Z thereto) athletic event freely to use "Olympic", while using the mighty arm of the law to prevent SFA&A from doing no more. (P.Br. 8-9)

of Rockford, 408 U.S. 105, 106-108 (1972) (ordinance prohibiting disorderly conduct was properly enforceable against black students who disturbed the peace). Because there is *no* time, place or manner in which SFA&A can hold a "Gay Olympic Games", these decisions are facially distinguishable from the case at bar.

In *Regan v. Time, Inc.*, 468 U.S. 641, 648-649 (1984), also cited by USOC in support of its time, place and manner analogy, a federal statute that prohibited photos of currency was found not to be a valid time, place and manner restriction, because, "[a] determination concerning the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers." Likewise, in the case at bar, where USOC decides which popular, public interest "Olympics" are in the best interests of amateur athletics and/or USOC, and supports the "Special Olympics", "Junior Olympics" and "Explorer Olympics" (J.A. 33), permitting a variety of other "Olympics" to survive as well (J.A. 93, 97, 99, 105, 247-252, 310-311), while litigating to prevent the "Gay Olympic Games" from proceeding by that name, there are judgments imposed about the appropriateness of these various "Olympics" as surely as there was a judgment imposed as to the photos of money in *Regan v. Time, Inc.*, above.

Indeed, counsel for USOC admitted early in this litigation that a content-based judgment was made by USOC as to SFA&A's use of "Olympics", when he argued that "because this is an activity which directly competes with the Olympic Games", there was "harm" to USOC, and "[t]he fact that it is identified with homosexuals and the homosexual community makes that harm to us even greater"; the "harm" claimed by USOC was the implication that USOC discriminates against gay and lesbian persons, in that the " 'Gay Olympics' suggests very strongly that they have to do it because the Olympics

themselves are not available to gay people." (J.A. 53-54).[5] Documentation of explicitly anti-gay reasons for USOC's conduct (which evidence generally is rare, because parties infrequently admit their biased motives in writing) also has been adduced by SFA&A in this case. (J.A. 246-252). The instant case involves USOC's content-based, homophobic control of free speech and association, and not a neutral restriction upon the time, place or manner of communication.

IV. USOC'S EVASION OF THIS COURT'S DECISIONS AS TO STATE ACTION, BY MEANS OF A SERIAL DISCOUNTING OF THE SIGNIFICANCE OF EACH STATE ACTION FACTOR, IS UNCONVINCING: IT IS THE SUM-TOTAL OF THE FACTORS THAT IS SUPPOSED TO DETERMINE THE RESULT.

USOC and amicus AFL-CIO essentially argue that no single indicium of "state action" shown to be present at bar should convince this Court of the presence of "state action" on USOC's part. SFA&A readily agrees that even sizeable governmental funding by itself, or performance of a traditional public function by itself, or federal chartering of a corporation by itself, or the apparent existence of monopolistic control of a particular activity by a governmentally empowered entity by itself, or the exercise of a specific federally provided authority that enables an entity to discriminate and suppress free speech, by itself, necessarily constitutes "state action". At bar, however, none of these factors is by itself; all are present.

Weighed together, the factors indicating that USOC was engaged in state action in denying use of "Olympic" to SFA&A while permitting it to others similarly situated

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[5] In its answer to SFA&A's counterclaims, USOC admitted that its counsel had stated to a television news reporter that SFA&A was "not a group *suitable* for use of Olympic terminology and symbols because SFAA's program did not comply with the requirements and needs of [USOC]." (J.A. 178) (emphasis added).

establish, at least, that there should have been a trial as to "state action" below. The deprivation of a trial to SFA&A on the state action issue cannot be made to agree with the decisions of this Court as to how the presence of state action is to be detected, assuming *arguendo* that USOC cannot be held a state actor as a matter of law on the instant record.

USOC proposes to overcome the key difference between this case and *DeFrantz v. USOC*, 492 F.Supp. 1181 (D.D.C. 1980) by misstating SFA&A's argument as to *DeFrantz*. SFA&A argued not that this case is different from *DeFrantz* because this is a First Amendment case, but that this case is different from *DeFrantz* because this case is both a First Amendment and a discrimination case, presenting precisely the sort of discrimination claim found by the *DeFrantz* court to be absent there, thus precluding the application of discrimination law precedents on the state action issue in *DeFrantz*. (Compare P.Br. 29-30 and R.Br. 45 n.66).

USOC's avoidance of *Martin v. IOC*, No. CV 83-5847 (C.D.Cal. April 4, 1984) is no more persuasive than USOC's handling of *DeFrantz*. USOC argues to this Court that it was not found to be a state actor in *Martin*. (R.Br. 45-46 n.67). This argument is contradicted by the content of the *Martin* opinion. In *Martin*, the District Court clearly and expressly found that USOC, as well as the Los Angeles Olympic Organizing Committee, was engaged in state action, *Id.* slip opinion at pp. 18-20, and the U.S. Court of Appeals affirmed that state action finding as to both USOC and LAOOC. 740 F.2d 670, 677 (9th Cir. 1984). Furthermore, USOC squarely conceded this fact in its brief to the U.S. Court of Appeals in the present case, stating that, in *Martin*, the District Court had found that "... *USOC was involved in state action*...". (Brief of Appellees, p.29) (emphasis added).

In *Martin v. IOC*, the Court of Appeals held that the state action finding had been arrived at by a careful weighing of the facts below. In irreconcilable contrast, in the case at bar the Court of Appeals ignored the record multiplicity of factors pointing to "state action", allowing trial on this

constitutionally all-important issue to be foreclosed in favor of the District Court's conclusory determination that USOC was not a state actor because "[t]he only case to have dealt with this question expressly found that that doctrine did not" apply. (J.A. 271)

V. USOC'S DISCRIMINATORY AND SPEECH-INVADING ENFORCEMENT OF ITS TRADEMARK AS TO "OLYMPIC" AGAINST SFA&A AT MINIMUM RAISES DISPUTES OF MATERIAL FACT THAT SHOULD HAVE BEEN TRIED BELOW.

Citing one case in a footnote, USOC contends that this Court should ignore all of the record evidence of homophobic bias by USOC in its denial of use of "Olympic" to SFA&A, and in its bringing of a suit[6] and its securing of an injunction against SFA&A's use of "Olympic"[7], and should instead respect "[t]he District Court's finding that there was 'no "sinister cast"'" in USOC's conduct at bar. *Inwood Labs v. Ives Labs*, 456 U.S. 844, 852, 857-858. (1982)(R.Br. 42 n.60) That citation dies when exposed to the light of the

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[6]USOC speaks of SFA&A's claim of discrimination in violation of equal protection, based in part on USOC's bringing suit against SFA&A while permitting others to engage in like uses of "Olympic", and in part on USOC's securing an injunction against SFA&A alone, as if this were a novel sort of claim. (R.Br. 42-44). SFA&A's equal protection claim is actually very ordinary, consisting as it does, *inter alia*, of the allegation that USOC has "intentionally discriminated against gay and lesbian individuals...and organizations...by means including...denying permission to such persons and groups to use the word 'Olympic' while allowing use of the word 'Olympic' to other individuals and organizations similarly situated" and by securing an injunction that suppressed speech by SFA&A and no other comparable group. (J.A. 173-175) (See cases cited in P.Br. 34).

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[7]The granting of an injunction that inhibits free speech is obviously state action, and USOC's brief seems to admit as much. (R.Br. 43-44). But then USOC and amicus AFL-CIO confound the clear element of state action in the injunctions issued below by urging that, in asserting that USOC's use of the courts to secure such an injunction constitutes state action, SFA&A

instant procedural and substantive record.

In *Inwood Labs*, a trademark infringement action was tried as between a pharmaceutical manufacturer who had discontinued use of red and blue capsules for a drug and another manufacturer who had taken up this color scheme for this drug; after trial, the District Court made specific findings of innocent intent on the part of the second manufacturer. *Id.* In stunning contrast, in the case at bar, there was no trial and there were no findings of innocent intent (or any other intent) as to USOC; the District Court denied trial and found only that USOC was not a state actor. (J.A. 270-271). *Inwood Labs* cannot conceivably offer a basis for this Court to uphold the deprivation of a trial to SFA&A as to the issues of discrimination in USOC's assertion of its rights at bar.

USOC proposes to shore up its argument that it has equally, rationally and even-handedly enforced its mark as to "Olympic" with a footnote, purportedly summarizing its litigation as to "Olympic" since passage of section 380 (R.Br.

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has taken *Shelley v. Kraemer*, 334 U.S. 1 (1948), beyond its bounds. (R.Br. 44; A. AFL-CIO 18). Those arguments unnecessarily confuse and complicate SFA&A's position. SFA&A here simply contends that in granting an injunction against protected speech, the lower courts contributed state action to the paradigm, even assuming *arguendo* that USOC itself was not engaged in state action when it denied SFA&A use of the term "Olympic" while permitting others similarly situated to use it. That application of *Shelley* is not a widening in any respect, as USOC seems to concede. (R.Br. 43-44). Moreover, USOC's attempt to cast *Shelley* in moribund terms fails to take into account that *Shelley* established a clear precedent as to the nature of judicial actions as state action, which this Court recently and unanimously had occasion to underscore. *Palmore v. Sidote*, 104 S.Ct. 1879, 1881 n.1 (1984) (citing *Shelley v. Kraemer* for the proposition that "[t]he actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fifth Amendment".) Amicus AFL-CIO's contention, that petitioners cannot rely on this meaning of *Shelley* because their petition for certiorari did not raise the issue of state action as to the injunction, is mistaken. (P.Cert., "Questions Presented" 3 and 4, p.i-ii; pp. 25, 40-41, 42-46; App.8 thereof at p. 121).

41 n.58), and with the accompanying assertion, not supported by any evidence of record and contradicted by the cases in that footnote, that USOC's enforcement actions under section 380 have focussed on athletic contests, trade activities and solicitors of public donations. Study of the cases cited in USOC's footnote 58 show a significantly different picture than USOC draws, in which SFA&A stands virtually alone as a target of USOC litigation against non-profit entities and against holders of athletic contests.

First of all, USOC leaves out its litigation against SFA&A and the STOP group[8] from footnote 58. This omission seriously distorts the picture presented, by concealing the "political" litigation of USOC using section 380 against groups whose uses of "Olympic" have offended it for primarily non-commercial reasons.

Second, of the fifteen (15) cases USOC lists in the footnote, twelve (12) involve unambiguously profit-making commercial enterprises and activities, and the marketing of goods and services using Olympic symbols as well as the word "Olympic". None of these involve suits against stagers of athletic contests or solicitors of public donations outside commercial circles; thus, the bulk of USOC's litigation under section 380 has been pure commercial trademark enforcement.

Third, of the three (3) remaining cases in USOC's footnote 58, none involve an asserted political, expressive user of "Olympic" engaged in centrally non-commercial activity. One of the cases concerns a group claiming association with and support by USOC. *National Amateur Sports Foundation v. USOC* (D.D.C. 1980) (J.A. 392- 393). One involves mixed facts that include collaboration of a non-profit entity with a commercial one to market "Joe Weider Olympians" food supplements, using "Olympic" symbols as well as the word. *USOC v. International Federation of Body Builders*, 219 U.S.P.Q. 353 (D.D.C. 1982). The only case in the

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[8] *Stop The Olympic Prison v. USOC*, cited in n. 2, supra.

footnote that was a suit by USOC to enjoin a non-profit organization's contest using the word "Olympic" was brought by USOC *after* SFA&A claimed discriminatory enforcement of USOC's mark against it, in August 1982. *USOC v. March of Dimes Birth Defects Foundation* (J.A. 437).

USOC's footnote 58 cannot alter or diminish the surpassing importance of the unrebutted fact that SFA&A stands alone among those whose political and expressive uses of "Olympic", in essentially non-commercial circumstances, has been enjoined. SFA&A in behalf of gay persons has been silenced and suppressed in its "Gay Olympic Games", while police, Armenians, youth, disabled persons, Explorer scouts, seniors and a variety of others have not been silenced or suppressed. (J.A. 33, 93) These other groups have received USOC's open authorization, or its tacit permission, to stage and promote "Olympics", in conjunction with their discrete efforts to resist societal prejudice against them and to celebrate their groups' special qualities in "Olympic" contests of their own design; SFA&A has been singled out by USOC for prohibition of similar expressive and associative behavior.

The fact that USOC has sued more than a dozen commercial enterprises to prevent trade profits based on unconsented-to uses of "Olympic", and that it has brought a number of other actions to prevent trademark registrations of "Olympic" by commercial competitors, does not change the discriminated-against posture of SFA&A relative to police, children, nationality groups and others who have either been openly authorized by USOC, or at least permitted, to have "Olympics" without litigation or injunctions. Assuming *arguendo* that USOC has policed its mark equitably as among commercial infringers, that fact does not begin to estabiish an absence of discrimination against SFA&A. The record remains crystal-clear that, in denying consent as to "Olympic" to SFA&A, and then in suing and enjoining it, USOC has discriminated, by permitting an array

of other popular, public interest "Olympics" to flourish while the "Gay Olympic Games" is enjoined.

Nor can USOC's invocation of *Columbia Broadcasting System Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) efface the evidence of discrimination from the instant record, or obliterate its constitutional significance. *CBS* is plainly distinguishable in the issues decided there. In the *CBS* case, the central constitutional issues did not include whether CBS used litigation and the injunctive processes of courts to discriminate among political users of its medium; the central issue of *CBS*, rather, was whether CBS could preclude an entire class of advertisers (there, editorial-type ads) from its commercial airwaves. *Id.* at 128-129.

On the issues of state action and of the degree of judicial scrutiny that should confront governmentally authorized infringements of free speech, the *CBS* case supports SFA&A. In *CBS*, this Court distinguished *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952), stating in pertinent part that:

> "...there Congress had expressly authorized the agency to undertake plenary intervention into the affairs of the carrier and it was pursuant to that authorization that the agency investigated the challenged policy [of radio broadcasts on public buses] ... and approved it on public interest standards."
>
> *Id.* at 119.

Here, like *Pollak* and unlike *CBS*, Congress specifically empowered USOC to exercise the control that resulted in the alleged infringement of rights. (See Am.MALDEF et al., p. 47). USOC's reliance upon *CBS* to undercut the state action and equal protection position of SFA&A is wholly misplaced.

VI. CONCLUSION

The case at bar does not present a commercial trademark infringer who is confronted with the ownership interest of the holder by way of litigation and injunction, by contrast to *USOC v. Intelicense Corp.*, 737 F.2d 263 (2d Cir. 1984), cert. denied, 469 U.S. 982 (1984); see also, *FTC v. A.P.W. Paper Co.*, 328 U.S. 193 (1946). Nor does it present a determination by a state government that, because of a history of unfair trade practices, an entire industry shall have to be deprived of the use of any trademarks in order to prevent deception of the public. *Friedman v. Rogers*, 440 U.S. 1 (1978). Nor, certainly, does the case at bar raise any issue as to the validity of myriad federal statutes bestowing certain protections on the Boy Scouts, American Legion or the like, nor does it question the validity of state anti-dilution laws. (See Am.AAU, pp. 29-49).

Instead, the case at bar is about a non-profit corporation that seeks to use a common, generic word in politically expressive ways, just as others similarly situated are permitted to do so. In a larger sense, perhaps, the case involves the use of the law either to enhance or restrict a set of free speech and associative interests in behalf of a contingent of the human rights movement. In this case, unlike *Intelicense, A.P.W. Paper* and *Friedman v. Rogers,* petitioners have been prohibited by an injunction from using a word that others use freely for similar purposes. Moreover, the injunction was acquired by an entity whose posture looks very like that of a state actor, under circumstances that show content-based restriction of speech and discriminatory motive on the part of the speech-suppressing agency.

These provocative and difficult constitutional issues need not be reached at bar. An interpretation of section 380 that holds that it bestowed no more than a trademark as to "Olympic" on USOC, to which normal trademark law principles, defenses and remedies apply, will avoid the bulk of these hard constitutional questions. If these issues must be reached, then surely SFA&A was entitled to a trial upon the

underlying factual questions as to state action, intent and purpose of the parties below. In any event, the injunction imposed below is constitutionally overbroad, even if SFA&A were a hardcore trademark infringer.[9]

Dated: 16 March 1987

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[9]Once again, USOC relies upon a main case (here, for the proposition that the injunction at bar was permissible) that does not support it. In *Champion Spark Plug Co. v. Sanders*, 331 U.S. 125 (1947) (R.Br. 39 n.54), unfair competition as well as trademark infringement had been proved. In upholding the injunction there, this Court stated in relevant part "...where unfair competition is established, any doubts as to the adequacy of the relief are generally resolved against the transgressor." (citation omitted). Not only has no "unfair competition" by SFA&A been proved at bar, but USOC failed to litigate any such claims beyond its initial pleading. (P.Cert. at App.1, p.2). Furthermore, *Champion Spark Plug* was decided without the degree of regard for the First Amendment implications of injunctions against commercial speech that has been developed in subsequent decisions of this Court and the lower federal courts, upon which SFA&A's challenge to the injunction herein relies, assuming SFA&A's speech could be called "commercial", such as in *In re R.M.J.*, 455 U.S. 191 (1982)(P.Br. 36-37; P.Cert. 41-46).

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No. 86-270

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SAN FRANCISCO ARTS & ATHLETICS, INC. and DR. THOMAS F. WADDELL,
Petitioners,

vs.

UNITED STATES OLYMPIC COMMITTEE and INTERNATIONAL OLYMPIC COMMITTEE,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE OF
(Amici listed on following page)
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INTEREST OF AMICI CURIAE

Amici file this brief in support of petitioners San Francisco Arts & Athletic, Inc. ("SFA&A") and Thomas F. Waddell. In the brief, amici address only the question whether respondent United States Olympic Committee ("USOC"), in discriminating against petitioners by preventing them -- but not certain other persons -- from using the term "olympic" in connection with athletic competitions, engaged in "state action" for purposes of the equal protection component of the Fifth Amendment to the Constitution.

The individual interests of the amici are contained in the Appendix.

I.

SUMMARY OF ARGUMENT

The USOC, an entity created by Federal charter, takes the position that, pursuant to 36 U.S.C. §380,[1] Congress has granted the USOC an absolute monopoly over the word "olympic," including the right to discriminate among groups at will in connection with the use of the word -- even it the discrimination is based solely on a group's exercise of its First Amendment rights.[2] In prohibiting petitioners from using the word

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[1] 36 U.S.C. §380, in relevant part, prohibits, without the consent of the USOC, the use of "the words 'Olympic,' 'Olympiad,' 'Citius Altius Fortius,' or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity."

[2] The interpretation and constitutionality of 36 U.S.C. §380 are discussed in other briefs.

"olympic" in connection with the SFA&A's amateur athletic competition (which was to be entitled "The Gay Olympic Games I"), while at the same time allowing other groups to use the word, the USOC has discriminated against petitioners in connection with petitioners' exercise of their fundamental First Amendment right to freedom of expression.

This brief will show that, assuming arguendo that Congress did intend to grant the USOC the exclusive and blanket right to use the word "olympic" (and that the Constitution permitted Congress to do so), the USOC's discriminatory conduct[3]

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[3] Although the Fifth Amendment does not explicity contain an equal protection clause, this Court has consistently held that the Fifth Amendment forbids discrimination which is "so unjustifiable as to be violative of due process." Bolling v. Sharpe, 347 U.S. 497, 499 (1954). See also Schneider v. Rusk, 377 U.S. 163, 170 (1964). The equal protection analysis used in the context of the Fifth

(footnote continued)

in allowing some groups, but not petitioners, to use the word "olympic" constitutes "state action"[4] for purposes of the Fifth Amendment.[5]

The Court of Appeals for the Ninth Circuit, without engaging in a proper factual and legal analysis, found, inter alia, an absence of state action on the part of the USOC and affirmed the district court's order granting respondents' motion for summary

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(footnote continued from previous page) Amendment (which applies to the federal government) is the same as that used in the context of the Fourteenth Amendment (which applies to the states). Buckley v. Valeo, 424 U.S. 1, 93 (1976).

4 Under the "state action" requirement, the Fifth Amendment protects only against governmental, and not against private, conduct. Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982), quoting Flagg Brothers v. Brooks, 436 U.S. 149, 156 (1978).

5 As discussed in other briefs, an appropriately narrow interpretation of 36 U.S.C. § 380 would render the inquiry into this constitutional issue unnecessary.

judgment. In fact, as this brief will demonstrate, the USOC's conduct did constitute state action for several independent reasons.

First, the USOC's conduct deprived petitioners of a preferred right -- the free speech right to use the word "olympic" to promote the public's understanding of gay persons. Where such a preferred right is involved, a court must engage in a closer inquiry to determine whether the conduct at issue constitutes state action. Such an inquiry reveals that, in enacting the Amateur Sports Act of 1978 ("the Act"), Congress amended the USOC's charter in order to further a strictly national interest: improving performance of the United States in international amateur athletic competition. Under the Act, futhermore, Congress chose to legislate

almost all phases of the USOC's activity. Moreover, the Act gave the USOC a monopoly over the word "olympic," which had been firmly established in the English language. The USOC was able to carry out the challenged conduct -- the prohibition against petitioners' use of tne word "olympic" -- solely by virtue of the federal statute. In light of these factors, a finding of state action was required.

Second, the USOC was expressly chartered in 1978 as an agent of the federal government. Moreover, the USOC's function (to coordinate amateur athletics and resolve disputes) could not be performed without federal action (in the form of the Act). The USOC's function is therefore the exclusive prerogative of the government, and the USOC necessarily performs a public

function, rendering its conduct in this case state action.

Third, by granting the USOC a monopoly over the word "olympic," Congress took a word that had previously existed in the public domain and gave absolute control over it to a private entity (the USOC), which now has the power to decide who among the public may use that word. As a result of this governmental action, the USOC now exercises exclusive control over a significant vehicle of expression. For this reason, also, the USOC engaged in state action when it exercised its monopoly over a standard English word to prevent petitioners from using that word in their efforts to increase the public's understanding of gay persons.

At the outset, amici emphasize that compelling policy reasons require that

the decision of the Court of Appeals be reversed. To affirm the Court of Appeals' ruling on the issue of state action would grant the USOC a license to discriminate with impunity in connection with the use of the word "olympic." Thus, the USOC could discriminate on the basis of race, religion, or ethnic background (as well as on the basis of sexual orientation or the content of expression), without being subject to any court's inquiry into the constitutionality of its discriminatory conduct. There would be nothing to prevent the USOC from, for example, granting the right to use the word "olympic" only to white supremacist organizations, but not to racial minorities. Such a result simply cannot be tolerated where the actor is specifically chartered by Congress for

the purposes of serving national interests and where the discrimination depends completely on the existence of a government-conferred monopoly.

As discussed below, the holding of the Court of Appeals on the issue of state action must be reversed.

II.

THE COURT OF APPEALS COMPLETELY FAILED TO UNDERTAKE THE APPROPRIATE FACTUAL INQUIRY INTO WHETHER THE CONDUCT OF THE USOC CONSTITUTED STATE ACTION.

A. The Court Below Failed to Analyze The Factors That Are Significant In Determinating Whether State Action Exists.

Importantly, "adherence to the 'state action' requirement . . . requires careful attention to the

gravamen of the plaintiff's complaint." Blum v. Yaretsky, 457 U.S. 991, 1003 (1982). The state action inquiry is "necessarily fact bound." Lugar v. Edmondson Oil Co., 457 U.S. at 939. "Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance." Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

The "necessarily fact bound" inquiry means that no universal and unwavering rule can be applied to every situation to determine whether state action exists. This Court, however, has readily found state action in the presence of certain factors. The Court has tended to find state action where (a) the ostensibly private actor has

deprived the challenger of a fundamental right; (b) the ostensibly private actor has a close nexus to a strictly public interest and is the object of extensive legislation and government regulation related thereto; and (c) the state has conferred on the ostensibly private actor a monopoly which is directly and closely related to the private actor's impairment of the challenger's fundamental right.[6] See, e.g., Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944). In addition, state action will be found to exist where the ostensibly private actor performs a public function that was

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[6] As discussed below, while the existence of only one of these factors may not, in a particular case, be sufficient to find state action (see, e.g., Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)), where all of the factors are present, a finding of state action is compelled.

traditionally the exclusive prerogative of the state. Blum v. Yaretsky, 457 U.S. at 1004-05 (1982).

In Smith v. Allwright, supra, the Texas Democratic Party refused to admit black Texans to membership and thus prohibited them from voting in the Democratic primary election. In concluding that the actions of the Texas Democratic Party constituted state action, the Court in Smith, 321 U.S. at 664, stated:

> "If the state requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, practically speaking, tc those whose names appear on such a ballot, it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the

> qualifications of the participants in the primary. This is state action within the meaning of the Fifteenth Amendment."

An examination of the holding in Smith v. Allwright reveals the several factors that led the Court to find state action on the part of the Texas Democratic Party: the challenged act involved a fundamental right (the right to vote as guaranteed by the Fifteenth Amendment); the Democratic Party in fact enjoyed a monopoly over Texas' electoral process (i.e., the regulations limited the choice of the electorate in general elections for state offices); and the State closely regulated its electoral procedure. See also Terry v. Adams, 345 U.S. 1003 (1953) (opinion of Black, J.) (state action found where a Texas political organization excluded blacks

from the electoral process on racial grounds).

Analogously, in Marsh v. Alabama, 326 U.S. 501 (1946), the Court reversed a state trespass conviction of a member of the Jehovah's Witness, who had distributed religious literature in a privately-owned company town. That distribution contravened the wishes of the town's owners, who invoked the state trespass law. This Court found that the company's conduct constituted state action. The Court noted that free speech rights occupy a preferred position under the Constitution. Marsh, 326 U.S. at 509. It also noted that, since the entire town was the company's private property, it was inevitable that the residents of the town could only exercise their free speech rights on the company's property. Id. Put differ-

ently, the company town enjoyed monopolistic control over the property within its borders. Finally, the company town performed the regulatory functions that would have been performed by a public municipality. Id. This is analogous to close regulation by the state.

Moreover, in the cases finding the existence of state action, the private actor's monopoly related directly to the challenged act itself. Indeed, absent the monopoly, the wrongful conduct could not have occurred. Thus, in Smith v. Allwright and Terry v. Adams, the absolute control of the Texas Democratic Party over the state's electoral processes enabled the ostensibly private actor (i.e., the Texas Democratic Party) to engage in the challenged acts of discrimination. Absent these

monopolies, the parties could not have excluded blacks from the states' electoral processes. Likewise, in Marsh v. Alabama, but for the company town's monopoly over its property, the challenged act -- prohibiting the distribution of religious literature -- could not have occurred. In short, the monopoly was so closely related to the challenged act that a finding of state action was appropriate.

As noted below, the principles leading to the finding of state action in Smith v. Allwright and Marsh v. Alabama define the parameters of the state action inquiry in this particular case. Under the proper analysis -- ignored by the court below -- the inescapable conclusion is that the USOC, in using its monopoly power over the word "olympic" to discriminate against

petitioners in connection with their fundamental right to free expression, engaged in state action.

B. In Concluding That The Conduct Of The USOC Was Not State Action, The Court Of Appeals Relied On An Inapposite Comparison Of The USOC With Owners of Copyrights And Trademarks And Failed To Consider The Factors Salient To The State Action Inquiry.

Apparently trying to avoid deciding what it conceded to be "the difficult issue of applicability of equal protection guarantees" and the equally difficult issue of whether the "USOC discriminated," the Court of Appeals, without analysis, found that the conduct of the USOC did not constitute state action. The Court of Appeals discussed the issue of "state action" in two parts. First, the Court of Appeals

noted that conferring "special property rights in USOC's trademarks [by Congress] does not make USOC's exploitation of those rights state action." International Olympic Committee v. San Francisco Arts and Athletics, 781 F.2d 733, 737 (1986). Since the monopoly rights of these other owners "can be enforced to limit protected speech without violating the Constitution because there was no state action," the court reasoned that there was no state action where the USOC discriminatorily enforced its monopoly rights in the word "olympic" against petitioners. Id.

Second, the Court of Appeals relied on Rendell-Baker v. Kohn, supra, and explained that it was irrelevant that the government financed the USOC and jointly marketed olympic medals with it,

because "neither financing nor contractual relationships by themselves suffice to make a private entity a governmental actor." 781 F.2d at 737.

1. The Court Of Appeal Erroneously Compared The Enforcement of The USOC's Broad, Governmentally Created Monopoly Rights With The Enforcement of The Limited, Privately Created Rights Of Copyright And Trademark Owners.

The Court of Appeals initially concluded that the USOC's monopoly over the word "olympic" was insufficient to find state action. The court below compared the USOC with owners of copyrights and trademarks, who, the court concluded, also had a monopoly conferred by Congress or by law, but who were not state actors. The Court of Appeals, however, failed to recognize that the method by which the USOC

obtained its monopoly rights in the word "olympic" (solely by virtue of an act of Congress) differs completely from the method by which copyright and trademark owners attain their respective "monopoly rights." The Court of Appeals also failed to recognize that the USOC's monopoly rights are far broader than the rights of copyright and trademark owners. For the purposes of a state action analysis, the distinction is crucial.

The rights of copyright and trademark owners are not created by a direct legislative act; instead their rights are created, not by Congress, but by the owners themselves. For example, copyright owners create their copyrights by fixing an original work in a tangible medium of expression. 17 U.S.C. §§ 101, 102, 302; Sony Corp. of America v.

Universal City Studios, Inc., 464 U.S. 417, ____, 104 S. Ct. 774, 783-84 (1984). Similarly, a trademark owner creates or attains its rights in a distinctive mark by adopting and using the mark in commerce to identify its goods or services and distinguish them from those manufactured or sold by others. 15 U.S.C. § 1127; Blue Bell, Inc. v. Farah Mfg. Co., Inc., 508 F.2d 1260, 1264-65 (5th Cir. 1975).

Unlike section 380, which grants the USOC monopoly rights over words that were and would otherwise still be in the public domain but for congressional intervention, the law of copyright does not give monopoly rights to works in the public domain. Harper & Row Publishers v. Nation Enterprises, 471 U.S. 539, ____, 105 S. Ct. 2218, 2224 (1985). Furthermore, unlike the law of

copyright, section 380 does not require that the USOC earn its statutory monopoly rights by creating something original. Since the interests of creativity and originality, which are the constitutional underpinnings of the limited monopoly provided by copyright (see Sony Corp. v. Universal City Studios, supra, 464 U.S. 417, ___, 104 S. Ct. at 782), are not served by granting monopoly rights to the USOC over the word "olympic," it is improper to compare the legal consequences of the enforcement of the USOC's monopoly rights with the enforcement of copyrights.

In addition, the rights of copyright and trademark owners are limited by registration requirements, duration limitations, and defenses such as "fair use." See, e.g., Sony Corp. v.

Universal City Studios, Inc., 464 U.S. 417, ___, 104 S. Ct. at 784 (fair use defense applied to defeat copyright owners' action). According to the Court of Appeals, however, such limitations do not apply to the USOC's monopoly rights in the word "olympic."

Given the above fundamental differences between copyrights and trademarks, on the one hand, and the USOC's monopoly rights, on the other it was erroneous for the Court of Appeals to base its conclusion on the results or reasoning of copyright or trademark cases.

2. The Court of Appeals Incorrectly Relied on Rendall-Baker v. Kohn.

Rendell-Baker v. Kohn, supra, seized on by the Court of Appeals as a

second ground for finding lack of state action, also fails to justify the Court of Appeals' holding. In Rendell-Baker, petitioners, school teachers employed by a private school, challenged the school's right to discharge them from employment without procedural due process. As demonstrated infra, Rendell-Baker entailed circumstances that differed markedly from the instant case.

The private school in Rendell-Baker did not have a governmentally-granted monopoly. Further, while the private entity in Rendell-Baker was subject to a certain degree of state regulation, the school was not a creation of the state. As such, the regulatory role of the state was relatively passive, in contrast to the close statutory control that Congress exercises over the USOC.

See discussion infra. Indeed, the Court noted in Rendell-Baker that the discharges were not compelled, or even influenced, by any state regulation.[7]

For the reasons discussed infra, the instant case is distinguishable from Rendell-Baker and the other cases finding an absence of state action. Under the facts of the instant case, the USOC engaged in state action when it

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7 Likewise, Blum v. Yaretsky, 457 U.S. 991 (1982), a companion case to Rendell-Baker, is distinguishable. In Blum, the decisions whether to transfer Medicaid patients to different hospitals without notice and hearing ultimately turned on a medical judgment made by private parties and according to professional standards that were not established by the State. Blum, 457 U.S. at 1009. In Blum, the decision thus in no way depended on state authority. Id. Here, the actions of the USOC are all designed to serve the federal government's interest. See discussion infra. Moreover, Blum involved neither a monopoly nor the impairment of a fundamental right.

exercised its congressionally-created monopoly power to invidiously discriminate against petitioners in connection with their use of the word "olympic."

III.

A PROPER ANALYSIS SHOWS THAT THE USOC ENGAGED IN STATE ACTION IN PROHIBITING PETITIONERS FROM USING THE WORD "OLYMPIC."

A. Because Petitioners Attempted To Exercise Their Right To Freedom Of Expression When They Chose To Use The Word "Olympic," The Appropriate Examination Into The USOC's Conduct Favors A Finding Of State Action.

The preferred nature of the constitutional rights at stake requires a close and sensitive examination into whether the USOC engaged in state

action, and renders a finding of state action more likely. See Weise v. Syracuse University, 522 F.2d 397, 406-08 (2d Cir. 1975). In using the word "olympic" in connection with their desire to promote the public's understanding of gay persons, petitioners were undoubtedly exercising their rights of free speech, a right preferred under the Constitution. See e.g., Saia v. New York City, 334 U.S. 558, 562 (1948); Marsh v. Alabama, 326 U.S. at 509. Indeed, the very purpose of the use of the word "olympic" by petitioners was to educate the general public on "the vitality, variety and versatility of the gay movement." As the dissent from the denial of the Petition for Rehearing en banc below noted: "What [petitioners] propose to do . . . lies at the very heart of the

first amendment: the wish to hold a public event to promote socio-political views some may find offensive." (Dissenting opinion of Kozinski, J.) (see Appendix C to Petition For Writ of Certiorari, at 49)

Here, the USOC consented to the use of the word "olympic" by Special, Junior, and Explorer Olympics, and tacitly approved of other entities' (including an International Police Olympics) use of the word. (See discussion in Brief for Petitioners) Yet, when petitioners wanted to use the word "olympic" for their event, they were prohibited from doing so. The approval given to other groups, combined with the USOC's total suppression of petitioners' use of the word "olympic," would constitute a prima facie case of discrimination in violation of the equal

protection guarantees of the Fifth Amendment if the USOC's conduct were found to be "state action."

Therefore, in finding the absence of state action, the Court of Appeals erred. The Court of Appeals failed to recognize that discrimination in connection with a fundamental right -- here, petitioner's First Amendment right to freedom of speech -- requires a closer and more sensitive inquiry into whether the ostensibly private actor in fact engaged in state action. As discussed below, an appropriately close examination of the USOC's conduct establishes beyond doubt that the USOC engaged in state action.

B. Congress Chartered And Provided For Close Supervision Of The USOC In Order To Further A Strictly National Interest.

The Congressional intent and motivation for enacting legislation that vests substantial and overriding power in the USOC demonstrates that the USOC's exercise of its power to deprive petitioners of the right to use the word "olympic" constituted governmental action for purposes of the equal protection component of the Fifth Amendment. The Act, 36 U.S.C. § 371 et seq., was passed in 1978 in response to a report of the President's Commission on Olympic Sports (the "Commission"), which found amateur sports in the United States to be in a chaotic condition and totally without regulation. See The Final Report of the President's Commission ("Commission Report"), at ix, 1-4, 11-13, 17-21 (U.S. Govt. Printing Office, Washington, D.C., 1977).[8] The

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[8] The Commission was established "to (footnote continued)

Commission concluded that this chaotic condition, together with inadequate funding for American amateur athletics, harmed the performance of American athletes in international competitions. Commission Report, at 11, 17.

As an outgrowth of recommendations of the President's Commission, Congress enacted the Amateur Sports Act of 1978. 1978 U.S. Code Cong. and Adm. News, at 7482. The USOC was chartered under the Act to

> "establish national goals for amateur athletic activities and encourage the attainment of these goals; promote and support amateur athletic activities involving the United States and foreign nations; promote and encourage physical fitness and public participation and amateur athletic activities; and assist organizations and

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determine what factors impede or tend to impede the United States from fielding its best teams in international competition." Commission Report, at ix.

> persons concerned with sports and the development of amateur athletic programs for amateur athletes."

36 U.S.C. § 374.

In furtherance of these strictly national goals, Congress vested in the USOC the power to serve as the coordinating body for amateur athletic activity in the United States directly relating to international amateur athletic competition. 36 U.S.C. § 375(a)(1). Moreover, 36 U.S.C. § 375(a)(2) empowers the USOC to represent the United States as its national Olympic committee in relationships with international bodies, while 36 U.S.C. § 375(a)(3) gives the USOC power to control the representation of the United States in certain amateur competitions.

Significantly, as one way of achieving the national goal of improving

America's performance in international competition, Congress included in the Act section 380, which, according to the USOC, gives the USOC the right to prevent any person or entity it chooses from using the word "olympic." Section 380 was intended to enable "the USOC to safeguard the USOC's ability to use financial resources that are a critical component of America's capacity to send world class amateur athletes into international competition without the massive government subsidies enjoyed by competitors from other nations." United States Olympic Committee v. Intelicense Corp., 737 F.2d 263, 264 (2nd Cir.), cert. denied, 469 U.S. 982 (1984). In effect, section 380 is the federal government's supplement to its initial direct financial subsidies. In addition to the revenue provided by section 380,

Congress also granted a direct subsidy authorizing a grant of $16,000,000 to finance the construction, improvement and maintenance of facilities for programs of amateur athletic activity and for other costs. 36 U.S.C. § 384. Further, as another way to satisfy these governmental objectives, the statutory scheme of the Act provides for close governmental supervision and regulation of the USOC.[9]

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9 For example, 36 U.S.C. § 375(b) provides that the USOC shall adopt and may amend its constitution and bylaws not to be inconsistent with the laws of the United States or of any State and that the USOC may amend its constitution only if it provides notice and hearing to the general public. 36 U.S.C. § 376 provides for rules relating to membership and dictates certain provisions that the USOC's constitution must contain. 36 U.S.C. § 382(a) requires that the USOC on an annual basis transmit to the President and to each House of Congress a detailed report of its financial operations for the preceding calendar year. 36 U.S.C.

(footnote continued)

The legislative history of the USOC further demonstrates how the USOC in its present configuration was established to serve a national interest. The Committee on the Judiciary concluded that the reorganization of the USOC "should provide the needed coordination of effort with all the interested sports organizations which best promotes amateur athletic activity relating to

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§ 382(b) provides regulations for dispute resolution. 36 U.S.C. §§ 391-96 provide detailed regulations concerning the USOC's role and jurisdiction over the national governing body of each specific amateur sport. In a number of places in the Act, the USOC is directed not to discriminate based on race, religion, color or national origin with respect to certain activities not relevant here (e.g., 36 U.S.C. § 391(b)), and is directed to encourage and provide assistance to amateur athletic activities for women, handicapped individuals, and racial and ethnic minorities in amateur athletic activities in which they are underrepresented. Id. § 370.

international athletic competition." 1978 U.S. Code Cong. and Adm. News, at 7491. Moreover, the governmental interest in improving American performance in international athletic competitions pervaded the Congressional debate on the Act. For instance, Representative Michel, speaking in support of the legislation, stated:

> "American athletes will go into these same games as products of a way of life. I do not believe that it is the purpose of the games to set one way of life against another. But it cannot be denied that spectators, both in Moscow and all over the world, certainly will have such a thought in mind when the events take place. So it would be good for our nation and for the athletes who represent us if the cooperation, spirit of individuality, and personal freedom that are the great virtues of our system are allowed to exert their full influence in the games. Too often, in fact, for

> 50 years these virtues
> have been buried beneath
> the bickering between and
> among various amateur
> groups who claim to speak
> for the athletes."

Cong. Record, at 31662 (House Debates, September 26, 1978).

Finally, the federal government and the USOC have engaged in joint activities intended to support the USOC's activities. For example, in connection with the 1984 International Olympic Games, held by the City of Los Angeles, the federal government and the USOC jointly marketed Olympic coins. (See Joint Appendix to Petitioners' Brief, at II-190)

Given the elaborate statutory scheme governing the USOC, the expressly national objectives of the Act, and the joint participation of the USOC and the government in furthering those goals, the inescapable conclusion is that the

USOC engaged in state action. Indeed, by virtue of the expressed common national goals of the USOC and the government, the close federal supervision, and the cooperative marketing program designed to fund the USOC, the USOC and the federal government enjoy a symbiotic relationship sufficient to render the USOC's conduct here state action. See Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961).

In light of all these factors, the USOC engaged in state action when it exercised its control over the word "olympic" on a discriminatory basis to the detriment of petitioners' rights of free expression. The Court of Appeals erred in ruling otherwise.

C. The USOC Is Endowed With A Federally-Granted Monopoly, Without

Which The USOC Could Not Have Prohibited Petitioners From Using The Word "Olympic."

The USOC enjoys an absolute monopoly over the word "olympic" only by virtue of 36 U.S.C. §380. While the existence of a monopoly may not be sufficient in and of itself to constitute state action (see Jackson v. Metropolitan Edison Co., 419 U.S. at 351-352), where, as here, a preferred right is involved, state action exists where the state-granted monopoly is directly related to the challenged act of the ostensibly private entity. Cf. Smith v. Allwright, supra.

The relationship between the conduct challenged here and the USOC's monopoly over the word "olympic" could not be closer. In fact, the USOC's

ability to engage in the challenged conduct depended on its monopoly.

Before Congress enacted 36 U.S.C. §380 and its predecessor, the word "olympic" had been in the public domain and therefore not subject to trademark protection. See Park 'N Fly v. Dollar Park 'N Fly, 469 U.S. 189, ____, 105 S. Ct. 658, 661-62 (1985) (no trademark protection for generic term). Accord, Canal Co. v. Clark, 80 U.S. 311, 323 (1871). Quite simply, therefore, but for the Congressional grant of a complete monopoly over the word "olympic," the USOC could not have discriminated against petitioners in the exercise of their right of free expression at all, and petitioners could have used the word in connection with their athletic event. Because the USOC's ability to discriminate against

petitioners derives solely from Congress' grant of monopoly rights, its conduct in using that monopoly to impair petitioners' freedom of speech in a discriminatory fashion constitutes state action. Cf. Smith v. Allwright, supra (but for the Democratic Party's monopoly over the State's elections, black voters could not have been excluded from elections).

The rationale used in Jackson v. Metropolitan Edison Co., supra, Public Utilities Commission v. Pollak, 343 U.S. 451 (1952), and Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), supports this concept. Indeed, in Jackson, 419 U.S. at 352, this Court implicitly recognized that, where a sufficiently close relationship exists between the challenged conduct and the monopoly, a finding of state action is proper.

Comparing the particular facts which were at issue in Pollak (in which the Court in fact found or assumed the existence of state action), and in Moose Lodge, the Court in Jackson concluded: "In [Moose Lodge and Pollak], there was an insufficient relationship between the challenged actions of the entities involved and their monopoly status [to find state action on the basis of the entity's monopoly]. There is no indication of any greater connection here." Jackson, 419 U.S. at 352.

The instant case presents a stark contrast to Jackson, Pollak, and Moose Lodge. In Jackson, the petitioner challenged the respondent's termination of her electrical service on the ground that the utility failed to accord her procedural due process. This Court assumed that the utility had at least a

partial monopoly.[10] Significantly, the challenged act -- the termination of plaintiff's utility service -- had only an attenuated relationship to the respondent's monopoly; i.e., even if the respondent utility company had had no monopoly whatsoever, it nonetheless would have had the ability to terminate petitioner's utility service without notice and hearing. The challenged act therefore in no way depended on the utility's monopoly.

Likewise, in Public Utilities Commission v. Pollak, supra, respondent challenged a public utility's right to pipe music into its buses. The Court disclaimed any intent to predicate its

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10 The Jackson opinion noted, however, that the monopoly was a natural one that had initially arisen, not by virtue of government action, but as a result of prevailing economic conditions. 419 U.S. at 352 & n.8. The exact opposite is true here.

finding of state action on the utility's monopoly. 343 U.S. at 462. As in Jackson, the challenged act (piping in music) had little or no relationship to the utility's monopoly: even absent the monopoly, the utility had the ability to pipe music into its buses.

Finally, in Moose Lodge, this Court found an absence of state action in connection with a private club's discriminatory conduct in refusing to serve black guests, although the private club had obtained its liquor license from the State. The Court noted that, even though liquor licenses were limited in number, no actual monopoly existed, since the plaintiff had other alternative locations in which he could consume alcoholic beverages in the same neighborhood. 407 U.S. at 177. Again, moreover, even if a monopoly had

existed, the relationship between the challenged act of discrimination and the monopoly would have been attenuated; i.e., even without a liquor license, the private club had the ability to exclude black guests.

By contrast, the nexus between the challenged act here -- the USOC's discrimination against petitioners by denying them the right to use a word in the English language -- and the USOC's monopoly over that word could not be any closer or more direct. But for Congress' grant to the USOC of a monopoly over the word "olympic," the USOC could not have denied petitioners the right to use the word. On the highly specific facts of the instant case, it is therefore appropriate to find that the USOC engaged in state action. Because the Court of Appeals

below failed to inquire into whether the monopoly that Congress granted the USOC over the word "olympic" was sufficiently related to the act complained of (namely, the USOC's invidious discrimination against petitioners by virtue of their exercise of their right to free expression) to give rise to state action, the Court of Appeals committed reversible error.

D. The USOC Performs A "Public Function."

Congress established the USOC in its present form, and endowed it with substantial powers, in order to fulfill a Presidential mandate. By its very terms, the Act expressly confers a "public function" on this technically private entity. In appointing the USOC to represent the United States, sections 375(a)(2) and (3) make the USOC an agent

of the United States government in connection with international amateur athletic competition. The governmental delegation of a public function could hardly be more explicit. In its capacity as the government's agent, the USOC engaged in state action in exercising its statutorily created control.

Although the most recent cases have indicated that a public function exists only where a private actor engages in a function "traditionally the exclusive prerogative of the State" (see, e.g., Rendell-Baker v. Kohn, 457 U.S. at 842 (emphasis in original)), those cases arose in a markedly different context from the one here. In previous cases, the function under scrutiny could have been performed either by a private actor or by a public actor, and was, in fact,

traditionally performed by one sector or another. E.g., Rendall-Baker, 457 U.S. at 842 (education for maladjusted youth); Blum v. Yaretsky, 452 U.S. at 1004-05 (private nursing homes); Jackson v. Metropolitan Edison Co., 419 U.S. at 352-53 (electrical utility). Under those circumstances, it made sense to inquire whether the function was traditionally the exclusive prerogative of the state.

The focus here necessarily differs. Since 1978, the USOC has performed a national function that was not performed by anyone. The very reason for passing the Act was to fill this vacuum through the instrumentality of a state-created organization that would be able to perform this intrinsically public function. An analysis into the "traditional" nature of the function is

simply irrelevant; as will be shown below, since 1978 the USOC has performed a new function.

The legislative history of the Act demonstrates that the function could not exist absent in-depth governmental intervention and involvement. The goal of the Act was to enhance the ability of the United States to participate in international amateur athletic events by eliminating the "chaotic" situation enveloping American amateur athletes and athletics. Thus, before the enactment of the Legislation, regulation of American athletics was, Congress determined, in reality nonexistent. See 1978 Cong. Record, at 31663 (House Debates, September 26, 1978) (remarks of Rep. Michel); Commission Report, at 12-13. The function of centrally organizing American amateur sports was

not performed by anyone until the President and Congress took control and vested in the USOC the exclusive power to oversee amateur athletics in the United States. See 1978 U.S. Code Cong. and Adm. News, at 7485. For these reasons, the USOC performs an indisputably "public function" made possible only by virtue of the governmental intervention.

A simple fact underscores the USOC's clear performance of a public function: the USOC in fact performs no private function. It is not, in contrast to the utilities in Jackson and Pollak, or the private nursing homes in Blum v. Yaretsky, in the business of generating profits. It is not a private nonprofit institution like the private schools in Rendell-Baker, but is instead federally chartered. It is not a social

club, like the petitioner in Moose Lodge. The USOC exists solely to further national objectives mandated by federal law. It was chartered so that the United States, through the performance of its amateur athletes, could enhance its stature internationally. And it is explicitly appointed to represent the United States.

The Court of Appeals failed to recognize the public purpose behind the USOC. As set forth above, given the absence of a private raison d'etre, the USOC necessarily performs a public function made possible only by virtue of federal intervention and regulation. The USOC's conduct in this case therefore constituted state action.[11]

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11 In this respect, the USOC is similar to the Texas Democratic Party in Smith v. Allwright,
(footnote continued)

IV.

THE USOC'S CHALLENGED CONDUCT CONSTITUTED STATE ACTION FOR THE SEPARATE AND INDEPENDENT REASON THAT CONGRESS REMOVED THE WORD "OLYMPIC" FROM THE PUBLIC DOMAIN AND VESTED ABSOLUTE CONTROL OVER THIS MEANS OF EXPRESSION IN THE USOC.

Petitioners' Brief conclusively demonstrates that the word "olympic" was in the public domain. It is also incontrovertible that the word would have remained in the public domain in the absence of Congress' alleged grant to the USOC of an exclusive monopoly in the word. Where a private entity assumes control of a resource formerly within the public domain, courts have

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(footnote continued from previous page) supra, which existed only for a public reason -- to participate in the electoral process -- and not for any truly private reason.

readily found "state action" in the private entity's exercise of that control. In Evans v. Newton, 382 U.S. 296 (1966), for instance, a city, pursuant to a will containing a "whites only" provision, had served as the trustee of a park. Notwithstanding the "whites only" provision in the will, the city had previously maintained the park as a racially integrated public facility. The city then resigned as trustee, and a state court appointed new, private trustees. Black citizens of the city feared that the private trustees would segregate the park under the mandate of the will. This Court stated that "[m]ass recreation through the use of parks is plainly in the public domain . . . ." Evans v. Newton, 382 U.S. at 302. Hence, under the facts of Evans, this Court held that "the

public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law." Id.

In the case at hand, the use of the word "olympic," like the use of the park in Evans, was "plainly in the public domain" until Congress passed legislation conferring on the USOC the exclusive right to the word. With this legislation, Congress removed a public resource from the free use by all and endowed the USOC with the right and power to pick and choose which persons would be allowed to use it. Under the circumstances of the instant case, as in Evans, the public character of the resource in issue "requires that it be treated as a public institution subject to the command of the [Fifth] Amendment,

regardless of who now has title" to or control of the public resource. Therefore, state action exists under the facts of this case.

The standard of the Court's inquiry into the "state action" issue is even more demanding where the public resource implicates a preferred right, such as the right of free expression under the First Amendment. See discussion supra. It is well established that words that are in the public domain implicate First Amendment rights of free expression. This is clearly demonstrated by the constitutional parameters of copyright protection. The Copyright Act protects First Amendment rights by refusing to extend copyright protection to that which is in public domain. Harper & Row Publishers v. Nation Enterprises, 471 U.S. 539, ___, 105 S. Ct. 2218, 2224

(1985). Similarly, in Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 840 (1978), this Court recognized that the First Amendment grants the press the right to use information within the public domain. Moreover, the public's right to information within the public domain is coextensive with that of the press. Nixon v. Warner Communications, 435 U.S. 589, 609 (1978). The Court has left no room for doubt that the public's use of words within the public domain is protected by the First Amendment. See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495 (1975).

If the USOC indeed has received, by dint of federal legislation, exclusive control over the word "olympic" (and assuming that such control were held to be constitutionally justifiable), then

the USOC's exercise of that control in granting and withholding consent to the use of the word constitutes "state action" for purposes of equal protection analysis. Not only does the USOC control a public resource, as did the private trustee in Evans v. Newton, but the public resource involved in the instant case is of vital First Amendment concern. The combination of these two factors, together with the other indicia of governmental action discussed supra, compels a finding of "state action" on the part of the USOC in this case.

This Court's opinion in Columbia Broadcasting Sys., Inc. v. Democratic Nat. Comm., 412 U.S. 94 (1973), supports the conclusion that a finding of state action is warranted where a private entity pursuant to government fiat exercises exclusive control over a

segment of the public domain which is protected by the First Amendment, unless a countervailing Constitutional right compels the court to find otherwise. In Columbia Broadcasting, the Court of Appeals below had held that, in refusing to accept editorial advertisements, television and radio broadcast licensees engaged in governmental action violative of the First Amendment. 450 F.2d 642, 651 (1971). This Court reversed that decision, but recognized that the Court of Appeals' characterization of broadcasters as "instrumentalities of the Government" was "not without validity" because the broadcasters are "granted use of part of the public domain." Columbia Broadcasting, 412 U.S. at 115. (Opinion of Burger, C.J., Rehnquist, J. and Stewart, J.).

Under the particular facts of Columbia Broadcasting, however, this Court declined to find governmental action with respect to the broadcaster's refusal to accept editorial advertising because the challenged conduct in that case was itself protected by the First Amendment. A plurality of this Court in Columbia Broadcasting stated that to hold that the broadcaster's conduct was governmental action would be "anomalous" and "contradictory" to the First Amendment, since it would offend the "concept of private, independent journalism," which is itself rooted in the First Amendment. Id. at 2095. The Court distinguished the private transportation utility in Public Utilities Commission v. Pollak, supra, whose conduct in playing music on its buses was held to be state action for

purposes of the First Amendment, from the private broadcaster which refused to relinquish its discretion over the context of its broadcast. The plurality explained that the "basic distinction, perhaps, between Pollak and this case is that Pollak was concerned with a transportation utility that itself derives no protection from the First Amendment." Columbia Broadcasting, 412 U.S. at 120. The compelling First Amendment interests of the broadcaster in controlling the content of its broadcasts vitiated what otherwise would have been a finding of state action.

Like the transportation utility in Pollak, the USOC derives no protection from the First Amendment. In contrast to the journalistic privacy and independence threatened in Columbia Broadcasting, there exists no

countervailing constitutional interest at stake to counteract a finding of state action in the instant case. The USOC's denying petitioners, but not many other groups, the right to use the word "olympic" in connection with their athletic competition therefore unequivocally demands a finding of state action.

V.

CONCLUSION

The Court of Appeals failed to conduct any meaningful examination whatsoever into the question whether the USOC engaged in state action. Under either of the state action analyses discussed in Parts III and IV above, the particular facts of the instant case lead to the inevitable conclusion that the USOC engaged in state action when it discriminated against petitioners in

connection with the use of the word "olympic." The holding of the Court of Appeals therefore must be reversed and the case remanded.

Respectfully submitted,

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APPENDIX

APPENDIX

INTEREST OF AMICUS CURIAE

Bay Area Lawyers for Individual Freedom (BALIF) is a professional organization of more than 400 gay and lesbian attorneys, law students and legal workers in Northern California. BALIF works to increase the representation and input of lesbians and gay men in the judiciary, local and state Bar organizations, and other policy-making agencies and commissions. The organization also takes action on questions of law and the administration of justice as they affect the lesbian and gay community, including the filing of amicus curiae briefs.

Lambda Legal Defense and Education Fund, Inc. ("Lambda"), is a New York nonprofit corporation, and is the oldest and largest national gay and lesbian

legal organization in the country. Lambda has appeared as counsel of record or as amicus curiae in numerous cases involving the legal rights of gay men and lesbians in state and federal courts throughout the country, including major challenges to statutes which restrict the constitutional rights of lesbians and gay men, and in cases that have challenged laws, regulations or private actions which discriminate against or restrict the basic civil rights of gay men and lesbians. Lambda has a strong interest in this case, and is particularly concerned with the denial of equal protection consistently experienced by gay individuals and organizations when exercising their constitutional rights.

Lesbian Rights Project is a nonprofit, public interest law firm,

organized to protect and defend, through legal action and legal education, the rights of lesbians and gay men. The Project provides representation in both individual and impact cases, conducts community education programs designed to inform lesbians and gays of their legal rights, holds education programs for lawyers to improve the quality of advocacy done on behalf of lesbians and gay men and produces articles, bibliographies and litigation manuals for use by attorneys throughout the country. The Project has appeared as counsel and has filed amicus briefs in the United States Supreme Court, the Circuit Courts of Appeal, and the courts of California.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national civil rights organization

established in 1967. Its principal objective is to secure, through litigation and education, the civil rights of Hispanics living in the United States. Among these rights is the Constitutional right to free speech under the First Amendment.

The National Council of Teachers of English is an educational organization of 114,000 members and subscribers, most of whom teach English in elementary and secondary schools, and in colleges and universities througout the United States and Canada. The Council supports First Amendment rights to free expression. The Council recently passed a Sense-of-the-House Motion at its annual business meeting opposing exclusive use of the historic word "olympic" by any group.

National Gay Rights Advocates (NGRA) is a non-profit, public interest

law firm dedicated to the protection and futherance of the civil rights of lesbians and gay men. NGRA's litigation program has taken it into 20 states, 7 of the U.S. Courts of Appeals and the U.S. Supreme Court.

Because of NGRA's special expertise and successes in the emerging field of gay rights law it has earned the praise of a U.S. District Court Judge and the Mayor of San Francisco. On three occasions NGRA has been invited to present oral argument in the U.S. Court of Appeals as an amicus curiae.

NGRA has more than 10,000 members and contributors from the fifty states and the District of Columbia. Many of these persons participated in the athletic event that was to be called the "Gay Olympic Games I". Many others were deterred from participating because of

this litigation. On behalf of these people NGRA asserts its interest herein as an amicus curiae.

Public Advocates, Inc. is a nonprofit public interest law firm. Since its inception in 1971, Public Advocates, Inc. has represented organizations of minorities, the poor, the handicapped, the disabled and the aged. Public Advocates, Inc. appeared as amicus curiae in the Court of Appeals in this case, and has appeared before the California Supreme Court on issues involving gay rights.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SAN FRANCISCO ARTS & ATHLETICS, INC. and DR. THOMAS F. WADDELL,
Petitioners,

vs.

UNITED STATES OLYMPIC COMMITTEE and INTERNATIONAL OLYMPIC COMMITTEE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE OF THE AMATEUR ATHLETIC UNION OF THE UNITED STATES, INC.; THE NATIONAL ASSOCIATION OF OLYMPIC BUSINESSES, (Continued within) IN SUPPORT OF PETITIONER

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BRIEF OF THE AMATEUR ATHLETIC UNION OF THE UNITED STATES, INC. THE NATIONAL ASSOCIATION OF OLYMPIC BUSINESSES, THE CENTER FOR CONSTITUTIONAL RIGHTS, AND MARY C. FIGLIULO, KATHERINE J. KREBS, LESLIE H. BALMAIN, ROBERT J. BARNETT, CARL GOODMAN, AND SUSAN BARNETT

INTEREST OF AMICI CURIAE

This brief amici curiae in support of Petitioners San Francisco Arts & Athletics (the "SFAA") and Thomas P. Waddell is submitted on behalf of The Amateur Athletic Union of the United States, Inc. (the "AAU"), The National Association of Olympic Businesses, The Center for Constitutional Rights, Mary C. Figliulo, Katherine J. Krebs, Leslie H. Balmain, Robert J. Barnett, and Carl Goodman.

The AAU is an amateur sports organization which sponsors athletic competitions and other sports programs for amateur athletes of all ages. The

National Association of Olympic Business is an association of commercial businesses which use the word olympic as part of their individual names, but which do not conduct athletic events. Mary C. Figliulio, Katherine J. Krebs, Leslie H. Balmain, Robert J. Barnett, Carl Goodman, and Susan Barnett, who were all either spectators or participants in the Gay Games of 1982 and 1986.[1]

In this brief, Amici provide the Court with information about the intent of Congress in granting protection to Respondent United States Olympic Com-

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[1]The qualifications of the AAU, The National Association of Olympic Businesses, The Center for Constitutional Rights, Mary C. Figliulo, Katherine J. Krebs, Leslie H. Balmain, Robert J. Barnett, Carl Goodman, and Susan Barnett as Amici are set forth in detail in the Appendix to this Brief.

mittee (the "USOC") for the words "Olympic," "Olympiad," "Citius Altius Fortius," and words similar thereto (the "USOC Designations"), and the resulting scope of that protection.

SUMMARY OF ARGUMENT

In the decision below, the United States Court of Appeals for the Ninth Circuit perpetuated an incorrect standard of protection for the USOC Designations. The statutory scheme for protecting the USOC Designations, set forth in the Amateur Sports Act of 1978 (the "Amateur Sports Act"),[2] is the same as that provided for the names of other federally chartered organizations and expressly refers to the remedies of the Trademark Act of 1946 (the "Lanham

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[2] 36 U.S.C. §371 et seq.

Act").[3]

The legislative history behind the Amateur Sports Act evidences the intent of Congress to provide the USOC with the conventional protection provided other federally charter organizations, against uses by others of phrases incorporating one or more of the USOC Designations. Congress specifically considered, but deleted by amendment, a proposal for providing sui generis protection for the USOC Designations.

It follows that the USOC Designations should not be accorded protection similar to that provided by state "anti-dilution" statutes, as the Respondents have argued. In support of this conclusion, it is noted that the

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[3]60 Stat. 427, as amended; 15 U.S.C. §1051 et seq.

Amateur Sports Act requires neither an injury to the business reputation of the USOC nor the dilution of the distinctive quality of the USOC Designations, at least one of which would be a predicate for a finding of dilution under state laws. Thus, the Respondent's interpretation of the Amateur Sports Act as providing anti-dilution protection seems to beg the question. Moreover, anti-dilution statutes are intended to protect strong marks like XEROX, not weak marks like OLYMPIC. In fact, when compared with most trademarks, the word OLYMPIC can be considered to have become a generic or merely descriptive term, incapable of broad protection in a dilution or a trademark sense.

The proper scope of protection for the USOC Designations should there-

fore be similar to that afforded trademarks under the Lanham Act. The USOC Designations should be protected against confusion, passing off, and other forms of unfair competition, but do not deserve, nor did Congress intend, any stronger protection. Moreover, the scope of protection for the USOC Designations is further limited by the affirmative defenses available to Defendants in infringement actions brought under the Lanham Act. The defenses of fair use, laches, and acquiescence are derived from the common law of trademarks, and do not require express mention in the Amateur Sports Act in order to limit the scope of protection afforded.

ARGUMENT

I. IN ENACTING THE AMATEUR SPORTS ACT OF 1978 CONGRESS INTENDED TO PROVIDE PROTECTION OF THE MARK "OLYMPIC" COMMENSURATE WITH THE PROTECTION PROVIDED TO OTHER FEDERALLY CHARTERED ORGANIZATIONS WITHIN THE PARAMETERS OF THE LANHAM ACT.

This case presents a very important opportunity for the Court to reassert the requirement that Congressional intent be carefully considered in construing federal statutes. Careful review of the legislative history should be required, and such review has not been made by federal courts previously construing 36 U.S.C. §380, the statute providing protection for the word "Olympic." This primacy of Congressional intent was emphasized in the interpretation of the Trademark Act of 1946 (Lanham Act) in the case Park 'N

Fly v. Dollar Park and Fly, 469 U.S. 189, 83 L.Ed.2d 582, 105 S.Ct. 658, 224 U.S.P.Q. 327 (1985), in which a similar failure to accord proper consideration to legislative history was criticized by the Court.

Of significance is the impact that the decision in this case will have on the scope of name protection rights that will be accorded to federally chartered organizations other than the USOC. This question does not appear to have been addressed by the Court since the case of FTC v. A.P.W. Paper, 328 U.S. 193, 90 L.Ed. 1165, 66 S.Ct. 932, 69 U.S.P.Q. 215 (1946). There the scope of protection for the words "Red Cross" was decided. As a result innocent users of generic words associated with federally chartered organizations have been placed in jeopardy.

A. **IN PASSING THE INITIAL UNITED STATES OLYMPIC ASSOCIATION INCORPORATION ACT OF 1950, CONGRESS INTENDED TO PREVENT ONLY FALSE DESIGNATIONS AND FRAUD IN THE USE OF USOC DESIGNATIONS**

The passage of the Amateur Sports Act of 1978 replaced provisions of the United States Olympic Committee Incorporation Act of 1950, including a provision relating to the protection of the word "Olympic" which read as follows:

> [I]t shall be unlawful for any person, corporation, or association ... for the purpose of trade, theatrical exhibition, athletic performance, and competition or as an advertisement to induce the sale of any article whatsoever or attendance at any theatrical exhibition, athletic performance, and competition or for any business or charitable purpose

> to use ... the words "Olympic," "Olympiad," or "Citius Altius Fortius," or any combination of these words... .If any person violates the provision of this section he shall be deemed guilty of a misdemeanor....[4]

By enacting the prior statute, Congress was concerned only with preventing false representations and fraud, as evidenced by the following excerpt from a committee report on that legislation:

> One particular problem which the association is faced with is the protection of the Olympic insignia. The International Olympic Committee holds each national Olympic Committee responsible for protecting the Olympic name and insignia from unlawful use. Thus, in order to protect its name and insignia from being used, section 9 of the bill provides that it would be a misdemeanor for

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[4]Pub. L. No. 805, c. 975, §9, 64 Stat. 899 at 901 (repealed, formerly codified at 36 U.S.C. §379).

> any person to falsely or fraudulently represent himself to be a member or agent of the organization for the purpose of soliciting, collecting, or receiving money or material, or to wear the insignia thereof for a fraudulent purpose or to use it fraudulently in connection with a commercial purpose.[5]

The legislative history associated with the statute supports an interpretation of the scope of prohibited uses of USOC Designations limited to an intent to defraud in connection with a commercial purpose.

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[5]S. Rep. No. 2523, 81st Cong., 2d Sess. (1950), reprinted in 1950 U.S. Code Cong. Serv. 3787.

B. **THE SUI GENERIS PROTECTION WITH RELATED REMEDIES IN EARLY VERSIONS OF THE AMATEUR SPORTS ACT OF 1978 WERE DELETED FROM THE FINAL VERSION OF THE ACT.**

An early version of the Amateur Sports Act of 1978, which was passed by the Senate, included a provision granting sui generis protection to the USOC for the word "Olympic." It read as follows:

> SEC. 110. (a) Without the consent of the Corporation [USOC], any person who -
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> . . .
>
> (3) uses for the purposes of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition -
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> . . .
>
> (D) the words "Olympic," "Olympian," "Olympiad," "Citius Altius Fortius," or any combination, simulation,

or confusingly similar derivative thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity; shall be liable in a civil action by the Corporation for the remedies provided in subsection (c) of this section.

. . .

(c) When a violation of any provision of this section is established in any civil action arising under this section, the Corporation shall be entitled to-

(1) obtain injunctive relief upon such terms as the court considers reasonable to prevent a violation or threatened violation of this section;

(2) recover the profits which the defendant accrued as a result of such violation;

(3) recover any damages sustained by the Corporation; and

(4) recover costs of the action, including, at the discretion of the court, the amount of reasonable attor-

ney's fees.[6]

The sui generis protection listed in the version of the legislation above (in subsection c, paragraphs 1-4) provides remedies especially formulated for the USOC Designations. It is significant that subsection c was subsequently deleted and replaced by a reference to the Lanham Act, as explained below.

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[6]124 Cong. Rec. 12866 (May 8, 1978).

C. **THE COMMITTEE REPORTS AND LETTERS DEMONSTRATE THE SPECIFIC INTENT OF CONGRESS TO PROHIBIT THE USE OF THE USOC DESIGNATIONS ONLY WHERE THEY WERE "TENDING TO CAUSE CONFUSION" AS PROSCRIBED BY THE LANHAM ACT.**

During Congressional Committee consideration of the proposed legislation, the following comments were made concerning the reasons for changing the protection provided for USOC designations:

> USOC would be able to protect certain symbols, emblems, trademarks, tradenames and words by civil action pursuant to the Trademark Act of 1946. Currently, the USOC charter provides a criminal penalty for use of certain symbols, emblems, or words which have proved to be unworkable, as to enforce it, a criminal intent needs to be

established.[7]

The Patent and Trademark Office, the administrative agency which examines and issues federal trademark registrations under the Lanham Act, at Congressional hearings on the Amateur Sports Act of 1978 offered illuminating testimony:

> The amendments made by section 110 of S. 2727, to which our comments are directed, would add to the list of designations whose unauthorized use is prohibited: . . . (3) a combination, simulation, or confusingly similar derivation of the words "Olympic," "Olympiad," or "Citius Altius Fortius," which would tend to cause confusion, mistake or deception, or which would falsely suggest a connection with the Corporation or any Olympic activity.

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[7]H.R. Rep. No. 95-1627, 95 Cong., 2d Sess. 10 (1978), reprinted in 1978 U.S. Code Cong. and Admin. News 7483.

In lieu of criminal penalties, section 110 provides that violators shall be subject to a suit in a civil action by the Corporation for the remedies provided in the Act of July 5, 1946 (60 Stat. 427, 15 U.S.C. 1051 et seq., known as the Trademark Act of 1946).

. . .

Section 110(a)(4) makes actionable not only use of the words "Olympic," "Olympiad," "Citius Altius Fortius," and any combination thereof, but also any simulation or confusingly similar derivation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity. We believe that the phrase "or confusingly similar derivation" is too broad in scope and would encompass any designation with the root "Olymp." We therefore believe that the phrase should be deleted. In such case the word "or" should be inserted before the word "simulation."

Section 110 carries forward some prohibitions from the existing statute enacted in 1950 and adds some new prohi-

bitions, e.g., words described in section (a)(4) tending to cause confusion, to cause mistake, or to deceive with respect to the Corporation or any Olympic activity.[8] [Emphasis supplied.]

The last quoted sentence from the Commissioner of Patents and Trademarks indicates his understanding that the changes enacted only applied to words "tending to cause confusion" with respect to the USOC or its activities. Since the language "or confusingly similar derivation" was removed from the Act apparently in response to this criticism it is clear that a broad expropriation of all uses of the word "Olympic" was not intended by Congress. Here Congress considered expropriation

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[8] Id., at 38 and 7496 (September 12, 1978 letter from Donald W. Banner, Comm. of Patents and Trademarks, to House Judiciary Committee Chairman Danielson).

of all uses and clearly chose not to do so. This is also demonstrated by subsequent changes to the language of The Amateur Sports Act of 1978.

These initial provisions concerning the scope of protections for the term "Olympic" were modified as follows by the House acting as the Committee of the Whole House in what became the final version of the Act:

> SEC. 110. (a) Without the consent of the Corporation, any person who uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition -
>
> . . .
>
> (4) the words "Olympic," "Olympiad," "Citius Altius Fortius," or any combination or simulation thereof, tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity;

> Page 14, line 3: Strike "liable" and insert "subject to suit."
>
> Page 14, line 4: Strike "subsection (c) of this section," and insert: "the Act of July 5, 1946 (60 Stat. 427: popularly known as the Trademark Act of 1946)."[9]

The final paragraph of the amendments listed above indicates the deletion of sui generis protection in the subsection c, and replacement with a reference to the Lanham Act. Thus, it is clear Congress specifically did not intend to grant the USOC Designations sui generis protection and it did intend these designations be controlled by the parameters of the Lanham Act.

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[9]124 Cong. Rec. 37069 (October 13, 1978).

D. COMMENTS FROM MEMBERS OF CONGRESS MADE CONTEMPORANEOUSLY WITH THE PASSAGE OF THE AMATEUR SPORTS ACT OF 1978 EVIDENCE A CONGRESSIONAL UNDERSTANDING THAT THE ACT'S AMBIGUOUS LANGUAGE WAS TO BE CONSTRUED PURSUANT TO THE BOUNDARIES OF OTHER FEDERALLY CHARTERED ORGANIZATIONS AND THE LANHAM ACT.

Comments made on the floor of Congress contemporaneously with the consideration of the Amateur Sports Act of 1978 evidence an intent that the statute be viewed in the the same light of other federally chartered organizations. The comments concern the changes made in the protections provided for the USOC designations:

> Further, under the bill as amended, the Olympic Committee would be able to protect certain symbols, emblems, trademarks, tradenames and

words by a civil action pursuant to the Trademark Act of 1946.[10]

The USOC is granted exclusive use protection, typical in Federal Charters, with respect to the Olympic name, international symbol, and emblem. [Emphasis added.][11]

The bill significantly expands the purposes and powers of the U.S. Olympic Committee. In addition, the USOC is granted broadened "exclusive use" protection with respect to the Olympic symbol, emblem, and name.[12]

These statements which concern the USOC Designations being granted protec-

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[10]124 Cong. Rec. 31660 (September 26, 1978)(Comments of Rep. Danielson in a lengthy summary of various portions of the Amateur Sports Act of 1978).

[11]124 Cong. Rec. 31670 (September 26, 1978)(Comments of Rep. Moorhead of California summarizing the House Judiciary Committee report on the Amateur Sports Act of 1978).

[12]124 Cong. Rec. 35646 (October 11, 1978)(Comments of Rep. Kindness summarizing various provisions of the Amateur Sports Act of 1978).

tion similar to the names of other federally chartered organizations and subject to the provisions of the Lanham Act are significant. The statements demonstrate that at the time of the Act's passage, members of Congress considered the passage of the Amateur Sports Act of 1978 as having boundaries equivalent to those provided other federally chartered organizations and as implemented by the provisions of the Lanham Act.[13]

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[13]Of note is the absence of any legislative history demonstrating a Congressional intent to apply legal standards to the Amateur Sports Act of 1978 which are analogous to state anti-dilution statutes. As of 1983, the laws in 22 states provide a statutory basis for dilution protection, but there has been a divergence of interpretation of such statutes, and a hesitation to find dilution without a likelihood of confusion. See, V. Devitt, "Coping With Statutes Which 'Muddy the Waters' of Trademark Practice," 11 APLA Q. J. 236, 243-6 (1983).

As enacted, the relevant portions of the statute reads as follows:

> Without the consent of the Corporation [USOC], any person who uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition-
>
> . . .
>
> (4) the words "Olympic," ""Olympiad," "Citius Altius Fortius," or any combination or simulation thereof, tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity; shall be subject to suit in a civil action by the Corporation for the remedies provided in the Act of July 5, 1946 (60 Stat. 427; popularly known as the Trademark Act of 1946).[14]

The wording used by Congress is very complex and ambiguous. It is unclear what words are modified by the

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[14]36 U.S.C. §380.

clause beginning with the present participle "tending" and including four prepositional phrases ("to cause confusion," "to cause mistake," etc.). That clause probably modifies the predicate "words" at the beginning of subparagraph 4. This interpretation would mean that the use of the word "Olympic" is only prohibited when "tending to cause confusion...." The punctuation is not consistent with interpreting the "tending" clause as restricting only the meaning of the last clause ("any combination of simulation thereof") in the series including the word "Olympic." If such a meaning were intended, the conjunction "or" should have been placed between the words "Olympiad" and "Citius Altius Fortius"; and a semicolon should have replaced the comma

after "Citius Altius Fortius."[15] Legal commentators have extensively criticized the use of such juxtaposed modifiers in legal instruments, and have noted the lack of substantive clarity which may result from references to a series of nouns. R. Dickerson, The Fundamentals of Legal Drafting 101-4, 128-9 (2d ed. 1986); Kirk, "Legal Drafting: The Ambiguity of 'and' and 'or'", 2 Texas Tech. L.Rev. 235, 251-2 (1970-1).

A federal statute punctuated and constructed much like that in 36 U.S.C. 380 was considered in Porto Rico Railway, Light & Power v. Mor, 253 U.S. 345, 64 L.Ed. 944, 40 S.Ct. 516 (1920). The statute under consideration in that case read as follows:

[15]See, Webster's Standard American Style Manual 18 n.28, 46 n.7 (1985).

> Said district court shall have jurisdiction of all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign state or states, or citizens of a state, territory, or district of the United States not domiciled in Porto Rico ... [Ibid., 253 U.S. at 347.]

The Court in Porto Rico concluded that the modifier "not domiciled in Porto Rico" applied to aliens as well as to American citizens, and modified each of the phrases in the series preceding it. The Court in that case carefully evaluated the intentions of Congress, and construed the ambiguous statute accordingly. The Porto Rico case provides strong precedent for construing 36 U.S.C. §380 as prohibiting uses of USOC designations only for uses "tending to cause confusion. . ." with USOC activities.

Congress expressly recognized the need to provide protection to the USOC from unfair competition by others using the USOC designations. This protection was envisioned as placing the Committee on an equal footing with other federally chartered organizations. This Congressional intent, combined with the explicit reference to the Lanham Act, indicates that the "Olympic" mark is to be accorded a scope of protection commensurate with the "likelihood of confusion" standard applied in like circumstances for other marks. There are a large number of existing federally chartered organizations that have similar statutory protection for their respective names.[16]

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[16]J. Gilson, Trademark Protection and Practice, §10.01[4] (1986)

II. THE USUAL STATE STATUTORY ANTI-DILUTION PROTECTION FOR STRONG MARKS WAS NOT INTENDED BY THE CONGRESS.

The USOC has argued in this case, and various courts have concluded in the past, that the standard to be used in protecting the USOC Designations is the same standard as that used in protecting certain marks under state anti-dilution statutes. That argument must fail in light of the purpose of anti-dilution statutes and the peculiar facts of this case.

The cases which have considered the scope of protection to be accorded to the word "Olympic" are: International Olympic Committee v. San Francisco Arts & Athletics, 781 F.2d 733, 228 U.S.P.Q. 585 (9th Cir. 1986); United States Olympic Committee v.

Intelicense Corp., 737 F.2d 2634, 222 U.S.P.Q. 766 (2d Cir. 1984); International Olympic Committee v. San Francisco Arts & Athletics, 219 U.S. P.Q. 982 (N.D. Cal. 1982); Ex Parte Olympia Brewing Co., 2 Trademark Rptr. 388 (1912); Stop the Olympic Prison v. United States Olympic Committee, 489 F.Supp. 1112, 207 U.S.P.Q. 237 (S.D. N.Y. 1980); United States Olympic Committee v. International Federation of Bodybuilders, 219 U.S.P.Q. 352 (D.D.C. 1982); United States Olympic Committee v. Olympic Herrenwaschefabriken Benzer, 224 U.S.P.Q. 497 (TTAB 1984); United States Olympic Committee v. Union Sport Apparel, et al., 220 U.S.P.Q. 526 (E.D. Virg. 1983).

Anti-dilution statutes are intended to protect "strong" marks against the loss of the distinctiveness or

identity of such marks. Allied Maintenance v. Allied Mechanical Trades, 42 N.Y.2d 538, 399 N.Y.S.2d 628, 369 N.E.2d 1162, 198 U.S.P.Q. 418 (1977), Comment, "Dilution: Trademark Infringement of Will-O'-the-Wisp?", 77 Harv. L.Rev. 520 (1964). The mark "Olympic" cannot be considered a strong mark given its historical origins and common meanings. It would be eligible for only minimal, if any, protection under a typical anti-dilution statute. V. Devitt, supra, at 244. Also, any claim by the USOC to exclusivity or distinctiveness must be tempered by the fact that, in 1950, 22,500 commercial enterprises in the United States had a prior legal right to describe them-

selves as Olympic.[17] To emphasize the weakness of the word OLYMPIC, one need only contrast it with a truly strong mark such as XEROX or KODAK.

In addition, the language of the Amateur Sports Act does not at all resemble the language typically found in anti-dilution statutes. For example, Section 12 of the Model State

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[17]A. Guttman, The Games Must Go On 215 (1984). The author correctly pointed out that the word OLYMPIC was in the public domain.

Trademark Act provides relief in the absence of confusion or competition only when the plaintiff can establish "an injury to business reputation or ... dilution of the distinctive quality of a mark."[18] In the absence of similar language in the Amateur Sports Act (or support in the legislative history), it is difficult to see the basis upon which Respondents claim anti-dilution protection. To the contrary, their interpretation of the

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[18]"Likelihood of injury to business reputation or of dilution of the distinctive quality of a mark registered under this Act, or a mark valid at common law, or a trade name valid at common law, shall be a ground for injunctive relief notwithstanding the absence of competition between the parties or the absence of confusion as to the source of good or services." Model State Trademark Act §12 (As Amended), reprinted in R. Callman, The Law of Unfair Competition Trademarks and Monopolies §40.35, Appendix 40, p. 293 (1984).

Amateur Sports Act to provide anti-dilution protection seems to beg the question.

III. THE UNITED STATES OLYMPIC COMMITTEE SHOULD BE ACCORDED NO GREATER SCOPE OF PROTECTION FOR THE MARK "OLYMPIC" THAN IS ACCORDED OTHER FEDERALLY CHARTERED ORGANIZATIONS FOR THEIR RESPECTIVE NAMES.

A. OTHER FEDERALLY CHARTERED ORGANIZATIONS WITH LESS GENERIC DESIGNATIONS HAVE ONLY BEEN GRANTED "EXCLUSIVE USE" PROTECTION.

Express federal statutory protection has been provided for the names associated with many federally char-

tered organizations.[19] However, many other federally chartered organizations do not have such statutory protection.[20] Since Congress intended the USOC Designations to have no more than the protections provided other federally chartered organizations, the protections provided should be no greater than those of other similarly

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[19] See, for example, 36 U.S.C. §691 et seq. (Boy's Clubs of America); 36 U.S.C. §1501 et seq. (National Ski Patrol System).

[20] See, for example, 36 U.S.C. §691 et seq. (Boy's Clubs of America); 36 U.S.C. §1501 et seq. (National Ski Patrol System).

situated organizations. A study of decisional law as related to analogous organizations is instructive.

1. THE SCOUTS

The Boy Scouts and Girl Scouts have been given express protection for their various organizational marks. Each of the cases considering the scope of protection has focused on likely confusion and has considered evidence of confusion. For example, in Adolph Kastor & Bros. v. FTC, 138 F.2d 824 (2nd Cir. 1943), defendant Kastor was selling "Scout" knives that were not endorsed or approved by the Boy Scouts. In enjoining Kastor from further use of the mark SCOUT on its knives, Judge Learned hand held that "the Boy Scouts have a cognizable interest in preventing such possible confusion." 138 F.2d at 825. See also, In Re Boy Explorers

of America, 67 N.Y.S. 2d 108 (Sup. Ct. 1946))("There is no real danger that the general public might be misled and confused by the use of the name 'Boy Explorers of America, Inc.'" 67 N.Y.S. 2d at 111); Boy Scouts of America v. Teal, 374 F.Supp. 1276 (E.D.Pa. 1974)("Here virtually every indicium of Scouting is being misappropriated by defendants in representing themselves to the public, to contributors and even to the United States Navy, as a recognized Sea Scout unit." 374 F.Supp. at 1279); Boy Scouts of America v. Winchester Repeating Arms Co., 15 Trade-Mark Rptr. 142 (1926)("To now permit the applicant to register the word 'Scout' as part of its mark would enable it to place upon the market a knife which would doubtless be regarded as a knife for Boy Scout use and

confusion in the trade would be the natural and probable result of such action." 15 Trade-Mark Rptr. at 143); Girl Scouts of the United States of America et al. v. Hollingsworth, 188 F.Supp. 707, 127 U.S.P.Q. 271 (E.D. N.Y. 1960)("The logical consequence of the defendant's acts and conduct is such as to cause deception." 188 F.Supp. at 715); Girl Scouts of the United States of America v. Personality Posters Mfg. Co., Inc., 304 F.Supp. 1228, 163 U.S.P.Q. 505 (S.D.N.Y. 1969)(By granting the Girl Scouts the sole and exclusive right to have and use its emblems, badges, marks, etc., in carrying out its purposes, "Congress intended only to protect the public and the Girl Scouts from the confusing or illegitimate use of plaintiff's symbols by those who might compete with it in

its normal purposes and endeavors." 304 F.Supp. at 1232. Thus, the USOC Designations by analogy should be granted no greater protection.

Quite properly, the focus in each of the above cited cases was on the possibility of confusion, possibility of deception, false claims of endorsement or approval, or unfair competition. None of the cases cited above applied anti-dilution law standards to determine the scope of federal protection to be granted for words used by the Boy Scouts or Girl Scouts. There is no reason why the federal protection granted to the USOC should be construed more broadly than the protection provided to the Boy Scouts and the Girl Scouts.

2. <u>THE RED CROSS</u>

The Red Cross organization has been given protection for the marks used by it. The words "Red Cross" have been used by many different commercial businesses for many years, including extensive use by Johnson & Johnson for their entire line of surgical dressings and allied products.[21] The power of the FTC to regulate use of the words "Red Cross," for persons who used the words (in particular, for toilet tissue and paper towels) prior to statutory prohibition, was considered in FTC v. A.P.W. Paper, 328 U.S. 193, 90 L.Ed. 1165, 66 S.Ct. 932, 69 U.S.P.Q. 215 (1946). The Court construed the congressional concern in prohibiting use of the words "Red Cross" as being "not only with

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[21] I. Lambert, The Public Accepts (1941)(republished in 1976).

protecting the Red Cross against pretenders but also with protecting the public against the false impression that goods purchased were the products of the Red Cross or were sponsored by it." Id., 328 U.S. at 198. An earlier case considered the use of a Red Cross emblem and the words "Red Cross Hygienic" on toothbrushes, where usage commenced after the statutory prohibition, but was related to previous usage. Loonen v. Dietsch, 189 F. 487 (S.D.N.Y. 1911). Judge Learned Hand explained that commercial uses of "Red Cross" before 1905 "arose from the fact that the Red Cross Society was concerned with field surgery and with the care of, and supplies for, the sick and wounded in battles and great public catastrophes." Id., 189 F. at 488-9.

It is significant that the Court in A.P.W. Paper recognized that the congressional intent in restricting the use of the words "Red Cross" was to protect against pretenders and false impressions of sponsorship. The same intent has motivated Congress to protect the USOC Designations, and the reach of 36 U.S.C. §380 should be limited to protecting against pretenders and false impressions of sponsorship. Moreover, there is reason to provide less protection for "Olympic" than for "Red Cross." As Judge Hand noted in Loonen, commercial uses of "Red Cross" arose because of the activities of the Red Cross Society. However, the word "Olympic" has extensive historical meaning beyond the activities of the USOC or IOC, and the intent of Congress must be interpreted in the

light of the ancient source, and meaning behind, the word olympic, as contrasted with the modern source and derivation of "Red Cross."

3. **THE LITTLE LEAGUE.**

The cases construing the federal statutory protection for the name "Little League" also look to evidence of the likelihood of confusion. Little League Baseball v. All-American Brush, 167 U.S.P.Q. 43 (S.D.N.Y. 1968); Little League Baseball v. Daytona Beach Little League, 193 U.S.P.Q. 163 (M.D.Fl. 1977); Little League Baseball v. Daytona Beach Little League, 193 U.S.P.Q. 611 (M.D.Fl. 1977).

In each of the analogous organizations discussed above, the courts have provided no more than exclusive use protection. Clearly, USOC Designations, terms with a generic history,

should be accorded no greater protection.

B. THE PROPER SCOPE OF PROTECTION FOR THE USOC DESIGNATIONS PARALLELS THE WELL-ESTABLISHED SCOPE OF PROTECTION FOR TRADEMARKS

The trend that emerges from cases in which the scope of "exclusive use" rights has been determined points toward protection that parallels that given trademarks under the common law and the Lanham Act -- no more and no less. That trend should not be surprising: trademark rights are also "exclusive" rights and courts have many years of experience in deciding the limits of "exclusive" trademarks rights. It is thus altogether logical that the USOC Designations be given this common form of protection.

Most important, however, is that the USOC Designations will not suffer with the trademark standard of protection. The USOC, and the public, will still be protected from confusion, passing off, and unfair competition. In sum, the USOC, and the public, will still be protected to the same extent that trademark owners and the public are currently protected under the Lanham Act. There is no reason to believe that that level of protection is insufficient.

C. DEFENSES RECOGNIZED IN TRADEMARK CASES SHOULD ALSO BE RECOGNIZED IN CASES BROUGHT UNDER EXCLUSIVE USE STATUTES

Respondents have argued that certain defenses available under the Lanham Act are not available to Defen-

dants such as Petitioners because the Amateur Sports Act refers only to the remedies provided by the Lanham Act. By the same token, it could be argued that common law defenses have not been prohibited by the Amateur Sports Act. In any event, Respondents appear to misunderstand the nature of the defenses available to a defendant in a trademark infringement suit. While it is true that several defenses are enumerated in the Lanham Act, this merely makes clear that so-called incontestable marks are not exempt from such defenses. Many of those defenses had their genesis in the common law of trademarks, and are natural limitations on the rights of trademark owners.

It is thus only reasonable that the Lanham Act defenses, as well as the common law defenses, apply to actions

brought under statutes such as the Amateur Sports Act. If a word is capable of describing something, as the word Olympic is, then the "fair use in description" defense should be available to protect the rights of the public in that word. In this regard, it is not unreasonable to conclude that the word CLYMPIC has become generic with respect to, or at least descriptive of, multi-event competitive activities. The Oxford English Dictionary gives examples of usage of the word OLYMPIC as early as the 1600's in contexts other than a quadrennial international multi-event sports competition. As much as Respondents USOC and IOC would like to believe that the word OLYMPIC is proprietary in the same manner that XEROX and KODAK are proprietary to their owners, the fact remains that the

word OLYMPIC has been in the English language for hundreds of years and, act of Congress or not, remains in the English language eligible for unlimited use in its generic and descriptive senses.

Similarly, if the holder of the "exclusive use" rights is guilty of laches or has acquiesced in an otherwise infringing use, those equitable defenses should be available to a defendant.[22] Finally, prior use should always be available as a defense, as

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[22]See, e.g., National Association for the Advancement of Colored People, aka NAACP v. N.A.A.C.P. Legal Defense & Educational Fund, Inc., 753 F.2d 131 (D.C.Cir. 1985)(NAACP guilty of laches in bringing suit against Fund; Fund permitted to continue using "NAACP" in its name).

trademark rights arise from use.[23] In sum, there is nothing in the language of the Amateur Sports Act, or in the legislative history preceding its enactment, to indicate that defenses which inhere in the very nature of exclusive rights, such as those granted in the Amateur Sports Act, should be denied to defendants.

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[23]This defense is expressly recognized in the Amateur Sports Act; 36 U.S.C. §380(a). This express provision was probably included to avoid problems involving a governmental "taking" of property that might result if the property rights in marks arising prior to the enactment of the statute were terminated. "Grandfather" clauses are somewhat common in the federal exclusive use statutes. See, e.g., 36 U.S.C. §27 (Boy Scouts); 36 U.S.C. §36 (Girl Scouts).

IV. THE WORDS OF THE STATUTE SHOULD BE HARMONIZED WITH THE CONSTITUTIONAL BOUNDARIES OF THE POWER OF CONGRESS UNDER THE COMMERCE CLAUSE AND LIMITED BY THE FIRST AMENDMENT PROTECTIONS

Congress is limited in its power to enact legislation and exert restraints based on the powers granted to it in the Constitution and denied to it by the Bill of Rights. Early trademark statutes enacted by Congress under the Patent and Copyright Clause were declared unconstitutional as an unauthorized extension of power.[24] The federal statute prohibiting unauthorized use of the Girl Scouts name was construed as not prohibiting a lampooning use of the

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[24]See, B. Pattishall, "Two Hundred Years of American Trademark Law." Two Hundred Years of English and American Patent, Trademark and Copyright Law 51-79 (1976).

name, and a state statute was declared (in dicta) to be limited by the First Amendment protections. Girl Scouts of the United States of America v. Personality Posters Mfg. Co., Inc., 304 F.Supp. 1228 (S.D.N.Y. 1969).

An analogous illustration makes clear the unallowable extension of power by Congress. For example, even if Congress should decide that football requires regulation, it would not have the Constitutional authority to establish a Federal Football Committee as a federally chartered organization with exclusive rights to the word "Football." There is no Constitutional provision granting Congress the power to withdraw the word "football" from the U.S. vocabulary, and to prohibit individuals from forming a "football team" or playing a "football game"

except by leave of a Federal Football Committee. Such powers are anathema to the U.S. system of limited government, and challenge the underpinnings of U.S. individual rights protections. International Olympic Committee v. San Francisco Arts & Athletics, 789 F.2d 1320 (9th Cir. 1986)(dissent from denial of petition for rehearing en banc).

CONCLUSION

It would be a great distortion of the existing statutory scheme for protecting the rights of federally chartered organizations, and would be contrary to Congressional intent, to exert restraints on the use of the mark "Olympic" beyond that provided under the likelihood of confusion test as used in the Lanham Act.

Respectfully submitted,

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APPENDIX

APPENDIX

INTERESTS OF AMICI CURIAE

This brief amici curiae is submitted on behalf of The Amateur Athletic Union of the United States, Inc., the Center for Constitutional Rights, and participants and spectators at the 1982 and 1986 Gay Games.

THE AMATEUR ATHLETIC UNION OF THE UNITED STATES, INC. (the "AAU") is a non-profit amateur sports organization which was founded in 1888 for the stated purpose of providing "amateur sports programs and physical fitness for all people -- all classes -- all ages." The AAU has over 80,000 volunteers in 50 associations conducting programs in 31 sports for over 200,000 registered athletes of ages 8 to 80. The AAU is recognized as a national governing body under 36 U.S.C. §391. The AAU is the

owner of the federally registered trademark AAU JUNIOR OLYMPICS and has conducted AAU Junior Olympics competitions since 1948.[25] Recent AAU JUNIOR OLYMPIC competitions have involved more than one million young athletes participating in 21 different sports.

THE NATIONAL ASSOCIATION OF OLYMPIC BUSINESSES is an unincorporated association of commercial businesses which use the word olympic as part of their individual business names, but which do not conduct athletic events.

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[25]**The AAU believes that its use of the AAU JUNIOR OLYMPICS mark prior to 1950 exempts current use of the mark form the Amateur Sports Act by virtue of the "grandfather" clause set forth at 36 U.S.C. §380(a). Nevertheless, the AAU is vitally interested in seeing that the Amateur Sports Act be interpreted narrowly in order to provide the AAU with the broadest possible scope of rights with respect to the AAU JUNIOR OLYMPICS mark.**

The National Association of Olympic Businesses presents the perspectives of the class of businesses which would like to use the word olympic without suggesting a connection with athletic events conducted by Respondents International Olympic Committee or United States Olympic Committee. It is believed that there exist a large number of businesses in this class, such as restaurants, record stores, and pizza parlors, which use the word olympic as part of their individual respective names, but which do not conduct athletic events. Among the businesses consenting to the use of their of their names in this brief are: Olympic Camera of Los Angeles, California; Olympic Homes, Inc. of Portland, Oregon; Olympic Packaging of Mundelein, Illinois; Olympic Medical Corp. of Seattle,

Washington; Olympic Delivery Services, Inc. of Boston, Massachusetts; Olympic Packaging Co., Inc. of Brea, California; Olympic Housewares, Inc. of North Kansas City, Missouri; and Olympic Laundry and Cleaners of Port Angeles, Washington.

Mr. Leo Oliver LaBranche, Jr., is the organizer of The National Association of Olympic Businesses. Mr. LaBranche is a songwriter and phonograph record producer who has a business using the name OLYMPIC RECORDS, and is plaintiff in an action LaBranche v. USOC, CV-85-481-RG, now on appeal to the Ninth Circuit, No. 85-6484. A Petition for Writ of Certiorari to the United States Supreme Court was filed in that case by attorneys for Mr. LaBranche on December 2, 1986.

THE CENTER FOR CONSTITUTIONAL RIGHTS ["CCR"] is a non-profit litigation and educational organization. Founded in 1966, to provide legal support in the southern civil rights movement, CCR has been a national resource for civil rights and social justice. Securing access to full rights for all lesbians and gays has been a priority for CCR.

MARY C. FIGLIULO, KATHERINE J. KREBS, and **LESLIE H. BALMAIN** were participants in the 1982 Gay Games and **KREBS** and **BALMAIN** also participated in the 1986 Gay Games, and both these 1982 and 1986 events were conducted by Petitioner San Francisco Arts & Athletics. **ROBERT J. BARNETT** and **CARL GOODMAN** were spectators at the 1982 and 1986 events, and **SUSAN BARNETT** was a spectator and volunteer organizer in the 1986 event. 59.

The participation and attendance of these individuals at the Gay Games of 1982 and 1986 came as a result of their belief that an international olympic competition of gay and lesbian athletes would project a wholesome and healthy perspective to the public in the face of concerted international attacks upon their civil rights. These individuals desire to attend and participate in future "Gay Olympic Games."

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JAN 5 1987

No. 86-270

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

SAN FRANCISCO ARTS & ATHLETICS, INC.
and THOMAS F. WADDELL, M.D.,
Petitioners,

v.

UNITED STATES OLYMPIC COMMITTEE
and INTERNATIONAL OLYMPIC COMMITTEE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The American Federal of Labor and Congres of Industrial Organizations ("AFL-CIO") moves for leave to file the attached brief *amicus curiae* in support of the respondents. Counsel for the AFL-CIO have been unable to obtain the petitioners' consent to the filing of that brief.

INTEREST OF THE AMICUS CURIAE

The AFL-CIO is a federation of 91 national and international labor organizations having a total membership of approximately 13,000,000 working men and women.

The Federation and its affiliated unions are presently, and over the years have been, parties to numerous cases raising First Amendment questions. While the factual context here is far removed from those which have generated that litigation, the doctrinal issues raised by the petitioners in this case cut across the entire field of free speech law and are thus of the most immediate concern to the labor movement. And precisely because the AFL-CIO's perspective on those issues is quite distinct from those of the parties to the case, we seek this opportunity to acquaint the Court with our views.

ISSUES TO BE COVERED IN THE BRIEF AMICUS CURIAE

As is more fully developed in the attached brief, this case raises fundamental question as to: the nature of the courts' authority to construe federal statutes in a manner that avoids possible constitutional difficulties; the scope of the "state action" doctrine; the extent of the "commercial speech" doctrine; and the place of "intellectual property" under the First Amendment. While we believe that the Court of Appeals came to the right result, that court did not break the case down into all its component parts and its answers to these questions are not therefore spelled out in detail. That approach makes analysis more difficult than it would otherwise be, particularly with regard to the "commercial speech" and "intellectual property" issues whose proper resolution is far from self-evident.

Against that background, the AFL-CIO's brief is structured to separate out each of the doctrinal areas implicated here and attempts to provide a more fully developed answer to each of the questions outlined above than is provided by the Court of Appeals opinion.

CONCLUSION

For the above stated reasons this motion for leave to file a brief *amicus curiae* should be granted.

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UNITED STATES OLYMPIC COMMITTEE
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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO contingent on the granting of the foregoing motion for leave to file that brief. The interest of the *amicus curiae* is set forth in that motion.

SUMMARY OF ARGUMENT

I. The Amateur Sports Act of 1978, grants to the United States Olympic Committee ("USOC") exclusive control of the use, in promoting, *inter alia*, any athletic performance or competition, of "the word 'Olympic', 'Olympiad', 'Citius Altius Fortius', or any combination or sim-

ulation thereof tending to cause confusion * * *." (36 U.S.C. § 380(a)(4) as amended.) Petitioner San Francisco Arts & Athletics Inc. (hereafter "SFAA") contends that § 380(a)(4) grants a right of action for an unauthorized use of the word "Olympic" *only* on a showing that the use tends to cause confusion with USOC's use of that word. That interpretation is foreclosed by the legislative history of the 1978 Act.

The present language of § 380(a)(4) originated in a House Committee substitute for a bill which had passed the Senate. The House Committee Report explained that the language was proposed by the Patent & Trademark Office of the Department of Commerce in a letter to the Chairman of the Subcommittee which was considering the Senate bill. The letter (which was appended to the Committee Report) states that the language "makes actionable *not only use of the words 'Olympic'*, 'Olympiad', 'Citius Altius Fortius', and any other combination thereof, but also any simulation or confusingly similar derivation thereof tending to cause confusion. * * *." (H. Rep. No. 95-1627, 95th Cong., 2d Sess. 15, 38.) Thus, the "tending to cause confusion * * *" clause clearly modifies only "any other combination thereof".

SFAA asserts (correctly) that a substantial First Amendment question is raised unless § 380(a)(4) is construed to require a showing that an unauthorized use of the word "Olympic" tends to confuse. SFAA argues, therefore, that its interpretation of that provision is required by the principle that "when a statute is ambiguous, 'construction should go in the direction of constitutional policy'." (*Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134.) But this sensible principle of judicial self-restraint "does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication." (*Commodity Futures Trading Comm.* v. *Schor*, —— U.S. ——, 106 S.Ct. 3245, 3252 (July 7, 1986)). For, as Justice Cardozo wrote in *Moore Ice Cream Co.* v.

Rose, 289 U.S. 373, 379, "avoidance of a [constitutional] difficulty will not be pressed to the point of disingenuous evasion." And the legislative history of § 380(a)(4) provides the requisite showing "of an 'affirmative intention of the Congress clearly expressed' to support an interpretation of a federal statute which 'would give rise to serious constitutional questions' ". (*NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 500, 504 and 506.)

II. On this summary judgment record, it must be accepted that USOC was engaged in invidious discrimination against SFAA in denying to SFAA, while granting to others, the right to use the word "Olympic." But the Court of Appeals concluded that, as a matter of law, such discrimination is not state action and therefore not subject to constitutional limitations. This Court's decisions squarely reject the theory that because the federal government has granted USOC the power to choose among applicants seeking to use the word "Olympic" to promote athletic competitions, USOC's exercise of that power constitutes state action subject to constitutional restraints. (*Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173; *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357; *Blum v. Yaretsky*, 457 U.S. 991, 1004-1005; *Rendell-Baker v. Kohn*, 457 U.S. 830, 839-980.)

SFAA has presented no evidence to suggest that the government is, in any way, involved in USOC's choices with respect to those who will be allowed and not allowed to use the word "Olympics." Rather SFAA argues that, "the governmental functions of regulating, controlling, sponsoring and raising funds for U.S. amateur athletic activities, including participation of the U.S. in the Olympices, are placed on USOC's shoulders by [the act of 1978]." (Pet. Br. 28). This argument fails because SFAA has not made a showing that those functions have ever been performed by the government, let alone the required showing that USOC is performing functions that are "traditionally the *exclusive* prerogative of the State."

(*Jackson*, 419 U.S. at 353; *Blum*, 457 U.S. at 1005 (emphasis added).) SFAA bases its "governmental function" theory entirely on *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715. But as was recently explained in *Rendell-Baker*, 457 U.S. at 842-843, *Burton* turned on the combination of state support of an enterprise and state profit from the enterprise's challenged discrimination. The fact that a private entity is using "public property" to perform a "public purpose" does not create a "symbiotic relationship" between that entity and the government or otherwise convert the private entity's decisions into state action.

III. As the parties recognize, the sole constitutional question presented by § 380(a)(4) is whether the First Amendment protects SFAA's use of the word "Olympic" to promote the Gay Games. This use appears at first blush to be "pure commercial speech which does no more than propose a commercial transaction," (*Posadas de Puerto Rico Assoc. v. Tourism Co.*, —— U.S. ——, 106 S.Ct. 2968 (July 1, 1968)), and as such, to be entitled to only limited First Amendment protection compared to other speech, and only "so long as it concerns a lawful activity and is not misreading or fraudulent" (*id.*). SFAA urges, however, that its use of the word "Olympic" is entitled to full First Amendment protection because its "sale of items with 'Olympic' is a subsidiary financial activity relative to the group's primary exercises of free expression and association." (Pet. Br. 33.) We agree with SFAA in this regard.

The Court held in *In re Primus*, 436 U.S. 412, that commercial speech analysis is inapplicable where the proposed sale of goods or services is "in the context of political expression and association"; in that context "a state must regulate with significantly greater precision." (*Id.* at 437-438.) The Court explained (*id.* at 438, n.32):

> Normally the purpose or motive of the speaker is not central to First Amendment protection, but it

> does bear on the distinction between conduct that is "an associational aspect of 'expresion', • • • [A]ppellant's speech—as part of associational activity—" was expression intended to advance "beliefs and ideas." In *Ohralik v. Ohio State Bar Assn.*, [436 U.S. at] 447, the lawyer was not engaged in associational activity for the advancement of beliefs and ideas; his purpose was the advancement of his own commercial interests. The line, based in part on the motive of the speaker and the character of the expressive activity, will not always be easy to draw, cf. *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748, 787-788 (1976) (REHNQUIST, J., dissenting), but that is no reason for avoiding the undertaking.

However, to say that SFAA's use of the word "Olympics" is entitled to full First Amendment protection is not to say that SFAA is entitled to judgment in its favor. Under this Court's precedents, SFAA's First Amendment rights are subordinate to USOC's property rights in the word "Olympic". See *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573-77; *Hudgens* v. *NLRB*, 414 U.S. 507, 518-21.

The dissenting judges below do persuasively demonstrate, on the authority of *Cohen* v. *California*, 403 U.S. 15, 26 (Harlan, J.), that Congress has adversely affected SFAA's First Amendment interests by granting USOC an exclusive right to use and control the word "Olympic" with respect to the promotion of athletic events. That grant must therefore be justified by a substantial governmental interest. In this instance Congress' action in protecting USOC's intellectual property rights is fully justified because USOC and its predecessor organization have used the word "Olympic" since 1896, when the modern Olympic Games began. The special meaning which the word "Olympic" has for the general public (and its unique value to SFAA) is thus "the product of [USOC's] own talents and energy, the end result of much time, effort, and expense." *Zachinni*, 433 U.S. at 575.

ARGUMENT

This case raises fundamental questions as to: the nature of the courts' authority to construe federal statutes in a manner that avoids possible constitutional difficulties; the scope of the "state action" doctrine; the extent of the "commercial speech" doctrine; and the place of "intellectual property" under the First Amendment. In the argument that follows we treat with each of those questions in the same order as do the Court of Appeals and the petitioners.

I. The Court of Appeals' Construction of 36 U.S.C. § 380(a)(4) Is Correct

A. At bottom, the dispute in this case is over the scope of 36 U.S.C. § 380(a), as amended by the Amateur Sports Act of 1978 (hereafter "1978 Act").[1] That section provides in presently pertinent part as follows:

> § 380. Use of Olympic symbols, emblems, trademarks and names
>
> (a) Without the consent of the Corporation [the United States Olympic Committee (hereafter "USOC")], any person who uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition—
>
> • • • •
>
> (4) the words "Olympic", "Olympiad", "Citius Altius Fortius", or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity; • • •[2]

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[1] Pub. L. No. 95-606, 78 Stat. 383.

[2] The omitted portions of the provision protect the Olympic Committee's symbol and emblem, prohibit false representations of an association with the Committee and preserve the rights of persons who make certain otherwise infringing uses which were per-

San Francisco Arts & Athletics Inc. (hereafter "SFAA") contends that USOC has a right of action for an unauthorized use of the word "Olympic" only on a showing that the use tends to cause confusion with USOC's use of that word. According to SFAA, the statutory clause "tending to cause confusion" must be applied to the entire § 380(a)(4), including "the word "Olympic". (Pet. Br. 20.) On the other side, USOC contends that this clause's sole office is to modify the phrase "or any combination or simulation thereof", so that the unauthorized use of the word "Olympic" for any purpose set forth in § 380(a) is actionable without proof that the use tends to cause confusion. (See the opinion below, 781 F.2d 733, 736 describing the parties' respective positions.)

In support of its reading of § 380(a)(4), SFAA argues that "the presence of significant constitutional questions must guide [the Court] in the interpretation of Section 380." (Pet. Br. 38.) See also SFAA's Pet. for Cert. 24-25, citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134-136 and *CSC* v. *Letter Carriers*, 413 U.S. 548, 571. As this Court put it in *Regional Rail*, "when a statute is ambiguous, 'construction should go in the direction of constitutional policy'." (419 U.S. at 134, quoting *United States* v. *Johnson*, 323 U.S. 273, 276.)

In this instance, as we now show, the USOC's admittedly broader reading of § 380(a)(4)'s prohibition is inescapable and the canon of statutory construction on which SFAA relies is therefore inapplicable by its own terms.

B. On a strictly linguistic level, both of the parties' interpretations of the bare words of § 380(a)(4) are tenable.[3] But this is a case in which the legislative history is

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mitted prior to the Act of September 21, 1950, Pub. L. No. 81-805, 64 Stat. 899 (hereafter "1950 Act"), which was the antecedent of the 1978 Act.

[3] The punctuation of § 380(a)(4), specifically the absence of a comma between the phrase ending with "thereof" and the phrase

entirely unambiguous and specifically addresses the precise question of interpretation before the Court.

Section 380(a) is a substantial revision of § 9 of the 1950 Act, 36 U.S.C. § 379 (1976) (amended 1978). The bill which, as revised, became the 1978 Act was first passed by the Senate. As it passed that body, the bill would have amended § 9 (redesignated § 110 and so referred to thereafter)[4] by prohibiting, *inter alia*, the unauthorized use

> of the words "Olympic", "Olympian", "Olympiad", "Citius Altius Fortius", or any combination, simulation, or confusingly similar derivative thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity.[5]

The House Judiciary Committee, however, amended the bill by substituting the language which was ultimately enacted. The House Report explained that change as follows:

> *Section 110 allows the USOC to protect* (1) the symbol of the International Olympic Committee; (2) the emblem of the USOC; (3) any trademark trade name, sign, symbol, or insignia falsely representing association with or authorization by, the International Olympic Committee or the USOC; (4) *the words "Olympic", "Olympiad", "Citius Altius Fortius", or any combination or simulation thereof falsely suggesting a connection with the USOC* by civil action pursuant to the Trademark Act of 1946. The current charter contains a similar provision

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beginning with "tending" is more consistent with USOC's reading. But this clue does not reveal Congress' intent so plainly that further inquiry is unnecessary.

[4] Section 201 of the Senate bill amends § 101(c) of the 1950 Act to redesignate the sections thereof. S. 2727, 95th Cong., 2d Sess., 124 Cong. Rec. 12865 (May 8, 1978).

[5] S. 2727, 95th Cong. 2d Sess., 124 Cong. Rec. 12866 (May 8, 1978).

> which provides for a criminal penalty in the case of an unauthorized use. However, this criminal penalty has been found to be unworkable as it requires the proof of a criminal intent. These changes were made in response to a letter from the Patent and Trademark Office of the Department of Commerce to subcommittee Chairman George Danielson which has been appended at the end of the report. [Emphasis added.] [6]

The underscored language paraphrases the language of the bill in a manner which sheds little, if any, light on the present question of interpretation.[7] However, the Committee Report makes clear that this, as well as other, changes in § 110 "were made in response to a letter from the Patent and Trademark Office of the Department of Commerce" to the Chairman of the Subcommittee which had considered the bill. That letter addresses the present question directly:

> Section 110(a)(4) makes actionable *not only use of the words "Olympic"*, "Olympiad", "Citius Altius Fortius", and any other combination thereof, *but also any simulation or confusingly similar derivation thereof tending to cause confusion*, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity. We believe that the phrase "or confusingly similar derivation" is too broad in scope and could encompass any designation with the root "olymp". We therefore believe that the phrase should be deleted. In such case the word "or" should be inserted before the word "simulation".
>
> *Section 110 carries forward some prohibitions from the existing statute enacted in 1950 and adds some new prohibitions, e.g. words described in section (a)(4) tending to cause confusion, to cause mistake, or to deceive with respect to the Corporation or any*

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[6] House Report No. 95-1627, 95th Cong., 2d Sess., p. 15.

[7] Again, the absence of a comma after the word "thereof" tends to support USOC's view.

> *Olympic activity.* Accordingly, the Grandfather Clause should reflect the permissible continued use of terms under the existing statute which were lawfully used prior to September 21, 1950, and also the permissible continued use of terms under this bill whose lawful use commenced prior to the enactment of this legislation. This will avoid the preemption of existing lawful uses in both cases. [Emphasis added.] [8]

As the House Report states and the text of the Act shows, these suggestions were adopted.

It is clear, therefore, that, in choosing the language which became law, Congress intended in the first place to make actionable all unauthorized uses of the word "Olympic" "Olympiad" and "Citius Altius Fortius" for the purposes described in § 380(a) *without regard to whether the use would cause confusion*, and that Congress intended to make actionable also any combination or simulation thereof which tends to confuse. Indeed, SFAA's contention that the clause "tending to cause confusion * * *" applies to the use of the word "Olympic" is utterly irreconcilable with Congress' intent "to carry forward some prohibitions from the existing statute enacted in 1950". For the "confusion" clause was not contained in the 1950 Act and, therefore, could not modify and limit the earlier statute's prohibition against unauthorized use of the word "Olympic".

C. This Court has made it plain that a showing "of an 'affirmative intention of the Congress clearly expressed' " is required to support an interpretation of a federal statute which "would give rise to serious constitutional questions". (*NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 500, 504 and 506.) Underlying this canon of construction, which serves the prudential purpose of avoiding unnecessary rulings concerning the constitutional limits on Congress' powers, is the entirely sensible presumption that Congress is duly mindful of these

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[8] House Report, *supra*, p. 38.

limits and especially that the Legislature is properly loath to infringe upon constitutional liberties. See *Regional Rail*, 419 U.S. at 134 quoted at p. 7, *supra*.

This sensible principle of judicial self-restraint

> *does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication;* "'[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . .' or judicially rewriting it.: *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964) (quoting *Scales v. United States*, 367 U.S. 203, 211 (1961)). See also *Heckler* v. *Mathews*, 465 U.S. 728, 742-743 (1984). [*Commodity Futures Trading Comm.* v. *Schor*, —— U.S. ——, 106 S.Ct. 3245, 3252 (July 7, 1986) (emphasis added).]

In *Schor* the Court added:

> The canon of construction that requires courts to avoid unnecessary constitutional adjudication did not empower the Court of Appeals to manufacture a restriction on the CFTC's jurisdiction that was nowhere contemplated by Congress and to reject plain evidence of congressional intent because that intent was not specifically embodied in a statutory mandate. See *Heckler* v. *Mathews*, 465 U.S., at 742-743. [106 S.Ct. at 3255.]

See also *Federal Election Comm.* v. *Mass. Citizens For Life*, —— U.S. ——, 55 L.W. 4069 (Dec. 15, 1986) (rejecting the respondent's various suggestions for narrowing the scope of 2 U.S.C. § 441(b) so as to exclude respondent's activities from the scope of that section's prohibitions (*id.* at 4069-4071), and then declaring the section unconstitutional as applied to those activities (*id.* at 4071-4074)).

As Justice Cardozo wrote in *Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 379, the *locus classicus* on this point, "avoidance of a [constitutional] difficulty will not be pressed to the point of disingenuous evasion. Here the

intention of the Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power." So here, also. As we have shown above, Congress, in enacting § 380(a), clearly expressed its "affirmative intention" that a tendency to confuse is not a necessary element of the cause of action created by that section to remedy unauthorized uses of the word "Olympic".[9]

II. The Claim That USOC's Refusal To Permit The Gay Games To Be Denominated An "Olympics" Violates The First Amendment Must Be Rejected For Lack Of State Action[10]

SFAA contends that USOC's refusal to permit SFAA to use the word "Olympics" to promote its Gay Games, although USOC has allowed other organizations to use that word in promoting their athletic competitions, is the product of an invidious discriminatory intent. SFAA asserts further that USOC is a "state actor" and that, therefore, this discrimination is unconstitutional. (Pet. Br. 28-30.)[11] On this summary judgment record,

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[9] We do not say that the rule of construction discussed in the text is wholly inapplicable to § 380(a). For example, a proper application of the rule might alleviate the constitutional concerns expressed by the dissenting judges in the Court of Appeals based on the assumption that the majority view below would outlaw the use of the word "Olympic" by businesses in contexts wholly unrelated to athletic exhibitions. See 789 F.2d 1319, 1323, n.4. For there is no evidence that Congress intended, by the general statutory phrases, "for the purpose of trade", and "to induce the sale of any goods or services", to reach businesses whose use of that term derives from their location on Olympic Boulevard in Los Angeles, or in the City of Olympia, Washington. See *id.*

[10] The phrases "state action" and "state actor" are commonly used (as, for example, in petitioners' brief) even where the issue is the putative involvement of the federal government rather than the involvement of one of the states. We shall use that terminology herein.

[11] In formulating their question presented on the state action issue, petitioners refer to "the First and Fourteenth Amendments" (Pet. Br. i), and their argument refers only to "discrimination and

it must be accepted that USOC was engaged in invidious discrimination against SFAA, but the Court of Appeals correctly concluded that, as a matter of law, any such discrimination is not state action.

SFAA's argument reduces to the proposition that because the federal government has granted USOC the power to choose among applicants seeking to use the word "Olympic" to promote athletic competitions, USOC's exercise of that power constitutes state action which is subject to constitutional restraints. That theory has repeatedly been disapproved by this Court.

In *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 173, the Court said:

> Our holdings indicate that where the impetus for the discrimination is private, the State must have "significantly involved itself with invidious discriminations," *Reitman* v. *Mulkey*, 387 U.S. 369, 380 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition.

Again, in *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 357, the Court held:

> At most, the Commission's failure to overturn this practice amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired. Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so "state action" for purposes of the Fourteenth Amendment. [Footnote omitted.]

And in *Blum* v. *Yaretsky*, 457 U.S. 991, 1004-1005, the Court reiterated:

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suppression of First Amendment rights" (Pet. Br. 29). The Fourteenth Amendment is plainly inapplicable but, for purposes of this brief *amicus curiae*, we indulge the assumption that petitioners are invoking the Fifth as well as the First Amendment. (Cf. *Bolling* v. *Sharpe*, 347 U.S. 497.)

> • • • [A]lthough the factual setting of each case will be significant, our precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. *Flagg Bros., Inc.* v. *Brooks*, [436 U.S. 149] at 166; *Jackson* v. *Metropolitan Edison Co.*, *supra*, at 357; *Moose Lodge No. 107* v. *Irvis*, *supra*, at 173; *Adickes* v. *S. H. Kress & Co.* [398 U.S. 144], at 170. Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment. See *Flagg Bros.*, *supra*, at 164-165; *Jackson* v. *Metropolitan Edison Co.*, *supra*, at 357.[12]

See also *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 839-840.

The operation of the standard is well illustrated by the *Moose Lodge* case. The Lodge was a private club which had been granted a license to sell alcoholic beverages under Pennsylvania's liquor regulations; Irvis had been denied service in the Lodge's dining room and bar because of his race. In applying the above-quoted test, the Court held that the facts that the state had issued the liquor

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[12] See also the preceding paragraph of the *Blum* opinion:

> • • • "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." *Jackson* v. *Metropolitan Edison Co.*, 419 U.S., at 350. The complaining party must also show that "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id.*, at 351. The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains. The importance of this assurance is evident when, as in this case, the complaining party seeks to hold the State liable for the actions of private parties. [Emphasis in original.]

license, that licensees enjoyed a partial monopoly, and that licensees were closely regulated were not singly or jointly sufficient to render the Lodge's discrimination, state action. (407 U.S. at 173-177.) The Court did conclude, however, that because the state liquor board regulations required the Lodge to adhere to its constitution and bylaws, the state was putting its compulsion behind the Lodge's discriminatory membership rules. (*Id.* at 177-179.) The Court therefore directed that the enforcement of that regulation be enjoined as unconstitutional insofar as the regulation required compliance with those provisions. (*Id.* at 179.)

In the present case, SFAA has presented no evidence to suggest that the government is, in any way, involved in USOC's choices with respect to who will be allowed and not allowed to use the word "Olympics". And, of course, there is no evidence of any governmental involvement in USOC's particular choice not to consent to SFAA's use of that word in sponsoring the Gay Games. Rather, referring to the 1978 Act, SFAA argues "that the governmental functions of regulating, controlling, sponsoring and raising funds for U.S. amateur athletic activities, including participation of the U.S. in the Olympics, are placed on USOC's shoulders by this scheme of federal law." (Pet. Br. 28.) SFAA thus invokes the principle described as follows in *Blum*, 457 U.S. 1005:

> [T]he required nexus [between private action and the state] may be present if the private entity has exercised powers that are "traditionally the exclusive prerogative of the State." *Jackson* v. *Metropolitan Edison Co.*, *supra*, at 353; see *Flagg Bros, Inc.* v. *Brooks*, *supra*, at 157-161.

SFAA's argument fails because there is no basis for its assertion that the described activities of USOC are "governmental functions". Indeed, SFAA has made no showing that those functions have ever been performed by the government, let alone the "*required*" showing that

USOC is performing functions that are "traditionally the *exclusive* prerogative of the State".

The grounds that SFAA does advance for its claim that USOC's activities are governmental functions are plainly insufficient under this Court's precedents. SFAA relies most heavily on the fact that in the 1978 Act Congress granted the USOC certain powers which USOC is free to exercise in a discriminatory fashion and in a manner that denies SFAA freedom of speech. (Pet. Br. 28-30.) But the fact the government has granted such powers merely raises the state action issue; it does not establish that the granted powers are "governmental" (Pet. Br. 29). This is clear, with respect to powers that may be exercised in a discriminatory fashion from *Moose Lodge*, see pp. 14-15, *supra*. And SFAA's contention that "to restrain free expression and to chill expressive association * * *" (Pet. App. 29) is necessarily a governmental function is likewise unsound, as the Court of Appeals correctly appreciated:

> That the United States conferred special property rights in USOC's trademarks does not make USOC's exploitation of those rights state action. Many property rights, such as ordinary trademarks and copyrights, [citations omitted], or the right to exclude, see *Hudgens* v. *NLRB*, 424 U.S. 507, 512-21 (1976), can be enforced to limit protected speech without violating the Constitution because there is no state action. [781 F.2d at 737.]

Indeed, in *Rendell-Baker* one of the plaintiffs' contentions was that they had been discharged by their privately-operated school "because of their exercise of their First Amendment right of free speech" (457 U.S. at 837), but the Court concluded that the school, in so discharging them, was not engaged in state action.

SFAA does not discuss any of the above-cited state action precedents; instead SFAA bases its governmental function theory entirely on *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715. The requisites for a *Burton*

state action finding were recently restated in *Rendell-Baker*:

> In *Burton*, the Court held that the refusal of a restaurant located in a public parking garage to serve Negroes constituted state action. The Court stressed that the restaurant was located on public property and that the rent from the restaurant contributed to the support of the garage. 365 U.S., at 722. In response to the argument that the restaurant's profits, and hence the State's financial position, would suffer if it did not discriminate, the Court concluded that this showed that the State profited from the restaurant's discriminatory conduct. The Court viewed this as support for the conclusion that the State should be charged with the discriminatory actions. Here [in *Rendall-Baker*] the school's fiscal relationship with the State is not different from that of many contractors performing services for the government. No symbiotic relationship such as existed in *Burton* exists here. [457 U.S. at 842-843.]

Thus, *Burton* turned on the *combination* of state support of an enterprise and state profit from the enterprise's challenged discrimination. As the Court made clear in *Rendell-Baker*, the fact that a private entity is using "public property" to perform a "public purpose" does not create a "symbiotic relationship" between that entity and the government, nor does it otherwise convert the private entity's decisions into state action. (457 U.S. at 840-842.) It follows that even if it is considered that the USOC is, in effect, being subsidized by the grant of the exclusive use of the Olympic words and symbols, that subsidy does not render its independent actions in exploiting that grant state action.[13]

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[13] SFAA argues that it was entitled to a trial on the state action issue because this Court has stated "Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed to its true significance." (Pet. Br. 30, quoting *Burton*, 365 U.S. at 722.) The quoted statement is incontrovertible (see also *Blum*, 457 U.S. at 1004 quoted, p. 14, *supra*), but does not warrant the conclusion that a trial

In sum, SFAA's argument that USOC is a "state actor" in refusing to consent to SFAA's use of the word "Olympics" is without merit.

We note finally that, in a separate point of their brief, petitioners advance an alternative state action theory: that the District Court's entry of an injunction against SFAA's unauthorized use of the word "Olympic" constitutes state action under *Shelley* v. *Kraemer*, 334 U.S. 1 (Pet. Br. 31.) If that contention were properly before the Court, it would raise a serious question and might well alter the proper outcome. But in seeking review of the Court of Appeals' state action holding SFAA's petition for certiorari proceeded entirely on the theory that *USOC* is a "state actor." Pet. for Cert. 36-41) citing *Burton* v. *Wilmington Parking Authority*, *supra*, *Rendell-Baker* v. *Kohn*, *supra*, *Evans* v. *Newton*, 382 U.S. 296 and *Marsh* v. *Alabama*, 326 U.S. 501. Petitioners' entirely distinct *Shelley* theory—that the *courts* are the operative state actors—is not "fairly included within the Question Presented and therefore not properly before the Court." (U.S. Sup. Ct. Rule 21.1(a).) See, *e.g.*, *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 151, n. 3.

III. SFAA's Unauthorized Use Of The Word "Olympics" To Promote The Gay Games Is Not Protected By The First Amendment

A. Discussion of the First Amendment issue raised by § 380(a)(4) is clarified and narrowed by respondents' important—and we believe compelled—concession in this Court:

> Despite Petitioners' cry that § 380 gives the U.S. Olympic Committee the "power to control the na-

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must be had whenever the presence or absence of state action is controverted. In the absence of a "genuine issue as to any material fact" with respect to state action, cf. F.R. Civ. P. 56(c), the "sifting" and "weighing" called for by *Burton* can be done by the District Court, without trial. Here, SFAA has not identified any such factual issue.

> tion's political vocabulary" (Petition at 25), the statute is limited to uses of Olympic "for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance or competition." When one court found that "Olympic" was being used for political speech, it held that such use was not prohibited by § 380 because it was outside this "range of uses" prohibited by the statute. *Stop the Olympic Prison* v. *U.S. Olympic Committee*, 489 F. Supp. 112 (S.D.N.Y. 1980). [Resp. Br. in Opp. 11.]

The sole question presented therefore, is whether the First Amendment protects SFAA's use of the word "Olympics" to *promote* the Gay Games.

B. At first blush, SFAA's promotional activities appear to be "pure commercial speech which does no more than propose a commercial transaction," *Posadas de Puerto Rico Assoc.* v. *Tourism Co.*, —— U.S. ——, 106 S.Ct. 2968, 2976 (July 1, 1986) (*"Posadas"*), quoting *Va. Pharmacy Bd.* v. *Va. Consumer Council*, 425 U.S. 748, 762. In this regard SFAA, like any other sponsor of an entertainment, is seeking to induce potential patrons to come to the box office. Under this Court's decisions, such "pure commercial speech" is entitled to only limited First Amendment protection compared to other speech, and only "so long as it concerns a lawful activity and is not misleading or fraudulent" (*Posadas*, 105 S.Ct. at 2976).[14]

SFAA urges, however, that its use of "Olympic" is entitled to full First Amendment protection:

> If section 380 is read to mean that Congress intended to empower USOC to be the arbiter of all uses of "Olympic," even among nonprofit groups engaged in essentially noncommercial activity w[h]ere the sale of items with "Olympic" is a subsidiary financial activity relative to the group's primary exercises of

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[14] The latter qualification is inapposite here since, as shown in part I, § 380(a)(4) is not limited to uses which tend to confuse the public, and the judgment below does not rest on any finding of confusion.

> free expression and association, see *New York Times* v. *Sullivan*, 376 U.S. 255 (sic), 265-266 (1964) and *Murdock* v. *Pennsylvania*, 319 U.S. 105, 112 (1943), then section 380 is unconstitutional as applied to the use of 'Olympic' by SFA&A and Waddell and those associated with them in the promotion of the Gay Olympic Games. [Pet. Br. 33.]

Implicit in SFAA's argument is the proposition that where the seller's objective is "political and philosophical," his statements aimed at promoting sales are not commercial speech. (Pet. Br. 5.) We agree, but because SFAA does not spell out the reasons why this is so and because this point is doctrinally significant, some elaboration is required.

This Court's decisions have confined the "commercial speech" concept to speech which does no more than propose a commercial transaction—*viz.*, to speech which proposes the purchase or sale of goods and services. The Court thereby protects First Amendment values because only a narrow, readily identified class of transactions is subject to diminished First Amendment protection. Moreover, by thus circumscribing the concept, the Court reduces constitutional controversy concerning the characterization of particular speech; contrast, for example, the abundant litigation in this and the lower courts as to whether a defamed individual is a "public figure".

It is entirely consistent with the first of these considerations to allow exceptions from the "commercial speech" class on the basis that the transaction proposed has objectives which transcend the commercial, and which are of substantial First Amendment value. However, because questions of "objective" and "purpose" are often difficult to resolve, such an exception introduces uncertainty and invites litigation.

The tension between these two concerns was resolved by this Court in favor of the free speech interest in *In re Primus*, 436 U.S. 412. The Court there rejected "the proposition that a State may regulate in a pro-

phylactic fashion all solicitation activities of lawyers because there may be some potential for overreaching, conflict of interest, or other substantive evils whenever a lawyer gives unsolicited advice and communicates an offer of representation to a layman." (*Id.* at 437.) The Court acknowledged, however (*id.*):

> Under certain circumstances, that approach is appropriate in the case of speech that simply "propose[s] a commercial transaction," *Pittsburgh Press Co* v. *Human Relations Comm'n*, 413 U.S. 376, 385 (1973). See *Ohralik* [v. *Ohio State Bar Assn.*, 436 U.S. 447,] at 455-459.

Indeed, in *Ohralik*, which was decided on the same day as *Primus*, the Court held that an attorney's solicitation of a client in a purely commercial transaction is subject to regulation under the limited protection afforded by "commercial speech" analysis.[15] But because Primus's solicitation was not for the purpose of pecuniary gain, but rather on behalf of an organization (the American Civil Liberties Union) which "engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public" (436 U.S. at 431), "commercial speech" analysis was inapplicable: "In the context of political expression and association, however, a state must regulate with significantly greater precision" (*id.* at 437-438).

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[15] The *Ohralik* Court said, *inter alia*:

> Expression concerning purely commercial transactions has come within the ambit of the Amendment's protection only recently. In rejecting the notion that such speech "is wholly outside the protection of the First Amendment," *Virginia Pharmacy*, *supra*, at 761, we were careful not to hold "that it is wholly undifferentiable from other forms" of speech. 425 U.S., at 771 n.24. We have not discarded the "common sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Ibid.* [436 U.S. at 455-456.]

In an accompanying footnote, the Court recognized and discussed the implications of the difference in the results in *Ohralik* and *Primus*:

> Normally the purpose or motive of the speaker is not central to First Amendment protection, but it does bear on the distinction between conduct that is "an associational aspect of 'expression'," Emerson, Freedom of Association and Freedom of Expression, 74 Yale L. J. 1, 26 (1964), and other activity subject to plenary regulation by government. [*N.A.A.C.P.* v.] *Button* recognized that certain forms of "cooperative, organizational activity," 371 U.S. 415 at 430, including litigation, are part of the "freedom to engage in association for the advancement of beliefs and ideas," *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958), and that this freedom is an implicit guarantee of the First Amendment. See *Healy* v. *James*, 408 U.S. 169, 181 (1972). As shown above, appellant's speech—as part of associational activity—was expression intended to advance "beliefs and ideas." In *Ohralik* v. *Ohio State Bar Assn.*, *post*, p. 447, the lawyer was not engaged in associational activity for the advancement of beliefs and ideas; his purpose was the advancement of his own commercial interests. The line, based in part on the motive of the speaker and the character of the expressive activity, will not always be easy to draw, cf. *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748, 787-788 (1976) (REHNQUIST, J., dissenting), but that is no reason for avoiding the undertaking. [436 U.S. at 438, n.32.]

It follows from *Primus* that if the purpose of SFAA's use of the word "Olympics" is to further "political expression and association", that use is not "commercial speech". We believe that SFAA's purpose is fairly so characterized.[26]

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[26] The basis for SFAA's characterization of its activities as "essentially noncommercial" is elaborated in its statement of the case. (Pet. Br. 4-5.) Briefly, SFAA points out that it is a nonprofit

C. To say that SFAA's use of the word "Olympics" is entitled to full First Amendment protection is not to say that SFAA is entitled to judgment in its favor. As the Court of Appeals explained:

> • • • [T]he word "olympic" and its associated symbols and slogans are essentially property. Such property rights can be protected without violating the First Amendment. *See Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573-77 (1977) (property rights in performance of human cannonball act may properly receive priority over First Amendment rights of broadcasters, *Hudgens* v. *NLRB*, 424 U.S. 507, 518-21 (1967) (state private property rights defeat claim to speak freely on the property of another). [781 F.2d at 737].

Since we must brief this case on the basis of "the law as it now is, [rather than as we] might wish it to be" (cf. *Hudgens*, 424 U.S. at 518), we agree that *Zacchini* and *Hudgens* state the principle which governs here—*viz.*, that SFAA's First Amendment rights are subordinated to USOC's property rights in the word "Olympic".[17] While we believe that the court below reached the correct conclusion in this regard, again, the point is of doctrinal significance and the supporting reasons given seem to us to be incomplete.

The dissenting judges below emphasized:

> To say that the word Olympic is property begs the question. What appellants challenge is the power

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corporation whose purpose is, *inter alia*, to educate the public to view the gay movement favorably, and that the purposes of the "Gay Olympic Games" were to "provide a healthy recreational alternative to be a suppressed minority" and, again, to educate the public to a more favorable "characterization of gay men and women." (Pet. Br. 5.) See also 789 F.2d at 1321 (dissenting opinion).

[17] SFAA does not argue for a different balance between First Amendment and property interests than was struck in those cases, and the petition for certiorari does not appear to encompass that issue.

> of Congress to privatize the word Olympic, rendering it unutterable by anyone else in connection with any product or public event, whether for profit or, as in this case, to promote a cause. [789 F.2d at 1321.]

The dissenting judges below correctly pointed out, too, that Congress' power to grant to a private party the exclusive use of a particular word is not absolute, but is subject to First Amendment constraints. Words are essential to the communication of ideas; as Justice Harlan has written, "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." (*Cohen* v. *California*, 403 U.S. 15, 26, quoted at 789 F.2d 1321.) Moreover, Justice Harlan reasoned in *Cohen* that

> words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. [403 U.S. at 26, quoted at 789 F.2d 1321.]

In this instance, for example, "[t]he word Olympic was no doubt chosen to foster a wholesome, normal image of homosexuals. Denying SFAA use of the word thwarts that purpose." (789 F.2d at 1321; dissenting opinion.)

In sum, the dissenting judges below persuasively demonstrate, on the authority of *Cohen*, that Congress has adversely affected SFAA's First Amendment interests by granting USOC an exclusive right to use and control the word "Olympic" with respect to the promotion of athletic events. Thus, that grant must be justified by a substantial governmental interest. It is doubtful whether enabling USOC to finance its activities by licensing the use of "Olympic" and of the other words and symbols set forth in § 380(a) would be a sufficiently compelling governmental interest standing alone. But that

interest does not stand alone. The USOC, and its predcessor organization,[18] have used the word "Olympic" since 1896, when the modern Olympic Games began. See the Trademark Registration reprinted in III Joint Appendix 378. That use fully justifies Congress' grant to USOC of a property right in the exploitation of the word "Olympic" for promotional purposes—especially where the promotion is of an athletic event—because it satisfies the standard correctly drawn by the dissenting judges below from *Zacchini*:

> [R]ights in intellectual property are limited to uses that have been invented, created or developed by the owner. They are not a wholesale prohibition against all public uses but provide limited protection for that which "is the product of [the owner's] own talents and energy, the end result of much time, effort, and expense." *Zacchini*, 433 U.S. at 575. [789 F.2d at 1322.]

And, as the dissenters acknowledged "So limited, rights in intellectual property are easily harmonized with the first amendment." (*Id.*)

This standard is entirely fair to SFAA. The special value which the word "Olympic" has for SFAA (see p. 24, *supra*), is due almost entirely to the efforts of the USOC (and those of respondent International Olympic Committee) in using that word in connection with the development, at those Committees' "time, effort and expense," of the modern Olympic Games. While the word traces its origins to the athletic competitions in ancient Greece (and, at a further remove, to Mount Olympus, the home of the Greek gods) "Olympics" would have little, if any, meaning to the general public in this country if the modern games established by the Olympic Committees had been conducted under a different name. That

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[18] The USOC was formally constituted in 1921, replacing a more informally organized Olympic Committee.

being so, the "secondary meaning" [19] created by the Committees' own "talents and energy" is intellectual property entitled to the protections properly granted to such property.

Under this Court's precedents, we do not see how the First Amendment can be held to provide SFAA the right to exploit this secondary meaning of the word "Olympic", even to promote SFAA's legitimate political and associational objectives, any more than the First Amendment provides SFAA, or any other speaker, the right to exploit any other person's private property. *Zacchini* and *Hudgens* make it clear that Congress has the constitutional power to prevent such free riding and to protect the property owner's ability to exploit his property in his own best interests. Congress, of course, need not exercise that power to the fullest and may, instead, in order to facilitate free speech, grant the property owner a more limited bundle of rights. Compare *Hudgens*, *supra*, with *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74. But the point here is that the First Amendment, as construed by this Court, does not require the Legislature to do so.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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[19] Cf. *Park 'N Fly, Inc.* v. *Dollar Park and Fly, Inc.*, 469 U.S. 189, 194.